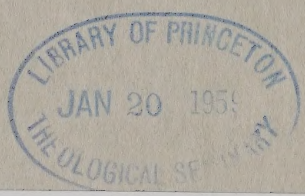

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GOD AND CAESAR IN NEBRASKA

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GOD AND CAESAR IN NEBRASKA

A Study of the Legal Relationship of Church and State, 1854-1954

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To the memory of my parents

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abbreviations

C. S.	*Compiled Statutes of the State of Nebraska*
Const.	*Constitution of the State of Nebraska*
G. S. 1873	*General Statutes of the State of Nebraska . . . 1873*
H. J.	*House Journal of the Legislature of the State of Nebraska*
H. R.	*Nebraska House Roll*
Laws	*Laws . . . of the State of Nebraska*
R. S.	*Revised Statutes of Nebraska*
R. S. C. S.	*Revised Statutes of Nebraska 1943 (Cumulative Supplement, 1953)*
R. R. S.	*Revised Statutes of Nebraska 1943 (Reissue of 1948, 1950, 1952 and 1954)*
Rep. Att'y Gen.	*Report of the Attorney General of the State of Nebraska*
S. F.	*Nebraska Senate File*
S. J.	*Senate Journal of the Legislature of the State of Nebraska*
Terr. Laws	*Laws . . . of the Territory of Nebraska*

preface

This study was originally prepared as a doctoral dissertation covering the period from 1854-1950. In preparation for publication the manuscript was revised into a centennial study.

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While it is impossible to give recognition to everyone who has helped in this research problem, special acknowledgment should go to Dr. John R. Alden, who directed the research and gave freely of his

time and effort. Sincere thanks are also due Dr. E. N. Johnson and Dr. James L. Sellers of the University of Nebraska for encouragement and advice, and Dr. Merle Curti and Dr. David Fellman of the University of Wisconsin, whose seminars stimulated the author's interest in the church-state problem. The staff of the State Library and lawyer friends were helpful in providing research materials. The author's colleague, Dean William F. Zimmerman of Midland College, was most understanding and helpful as was Mrs. Ardis Zakovec, whose careful typing was much appreciated. Thanks should go also to the University of Nebraska, which has made possible the publication of the study.

For the long hours spent by his wife in checking and proofreading, the author must be eternally grateful.

Orville H. Zabel

1 / *Introduction*

Most Americans have assumed that a well-defined line was drawn between church and state in the United States at some time in the remote past, probably when the Federal Constitution was adopted. Actually, however, this line has been somewhat nebulous and ill defined.

The Federal Constitution makes only two direct references to religion. Article VI provides that "no religious test shall ever be required as a qualification to any office or public trust under the United States." The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The First Amendment has been the center of considerable controversy in recent years. This controversy has resulted especially from the tendency of the United States Supreme Court to hold that the Fourteenth Amendment has made the First Amendment applicable to the states.

Indications that the church-state problem has not been finally settled in the United States are not difficult to find. At the state level a number of issues, particularly in the field of education, have been irritants. Likewise, widespread interest has been shown recently in related problems on the national level, such as the proposal for federal aid to education in 1949. This proposal led to demands by Roman Catholic forces for aid to parochial schools. These demands culminated in the defeat of the proposal. One would be naive to assume that this matter will not appear again in the near future. The envoy-to-the-Vatican issue, which saw the lines drawn largely between Catholic and Protestant, has been of recent national interest. Also, several important

cases involving the church-state issue in the field of education have been before the United States Supreme Court recently.[1]

Although historically the church-state controversy has been largely confined to the state level, in the last few years there appears to have been gradual assumption of jurisdiction by the Federal Government over church-state problems, especially in the field of education. Such a development is in line with the tendency of the Government to assume responsibility in areas which previously were largely reserved to the states or private agencies, and it should be seen in the perspective of expanding nationalism.

The extension of federal jurisdiction over church-state problems has been made possible by judicial expansion of the Fourteenth Amendment to include parts of the first eight amendments. The First Amendment merely provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It is common knowledge that several states had varying degrees of establishment of religion for many years after the adoption of this amendment. For years it was assumed that not only this portion but the entire First Amendment and, in fact, the first eight amendments limited the Federal Government only. In 1925, however, the United States Supreme Court declared

> that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.[2]

Since 1925 the Supreme Court has decided a series of cases expanding the due process clause of the Fourteenth Amendment to include certain of the first eight amendments. In several cases it was held that the clauses of the First Amendment referring to religion were made equally applicable to the states by the Fourteenth Amendment.[3] While there have been a number of vigorous critics of this interpretation, the extent

[1] For example, see the school bus case, *Everson v. Board of Education,* 330 U. S. 1 (1947); the released time cases, *Ill. ex rel. McCollum v. Board of Education,* 333 U. S. 203 (1948), and *Zorach v. Clauson,* 343 U. S. 306 (1952); and the Bible reading case, *Doremus v. Board of Education of Hawthorne,* 342 U.S. 429 (1952), upon which the court refused to rule.

[2] *Gitlow v. People of New York,* 268 U. S. 652, 666 (1925).

[3] It was so held in *Cantwell v. Connecticut,* 310 U. S. 296 (1940); *Chaplinsky v. New Hampshire,* 315 U. S. 568 (1942); *Everson v. Board of Education,* 330 U. S. 1 (1947); and *Ill. ex rel. McCollum v. Board of Education,* 333 U. S. 203 (1948).

to which expansion of federal jurisdiction over church-state issues will go in an area formerly reserved largely to the states is as yet uncertain.

At a time when the control over the relationship of church and state seems to be shifting from the state governments to the Federal Government, it was decided to undertake a case study of the church-state problem in Nebraska. Such a study, stretching over a century, appeared to make possible a contribution to the understanding and solution of problems which have recently gained prominence and which will probably appear frequently in coming years.

Any contribution, however slight, to an understanding of what constitutes the most desirable relationship of the church and the state may be of considerable value. Such a contribution would be especially valuable when the human freedoms to which the western world has paid allegiance seem to be facing the threat of extinction. Interwoven into the relationships of church and state are the problems of religious freedom. It is largely the relationship of these two institutions which determines the degree of religious freedom enjoyed by individuals. The right of religious liberty "is as fundamental in a free government like ours as is the right of life, liberty, or the pursuit of happiness."[4]

One result of religious freedom in the United States has been extreme denominationalism. The various denominations have a variety of beliefs and represent several different types of ecclesiastical organization. These differences have increased the demand for the protection of the religious freedom of all.

Nebraska has had numerous religious sects represented within its borders from the earliest days of its history. As a background for consideration of the church-state problem in Nebraska, some knowledge of the religious complexion of the state is useful; for out of sectarian differences have arisen many problems in which the secular government has been involved.

Several conclusions may be drawn from church membership statistics available for Nebraska since 1890.[5] First, most church members have belonged to a few major sects. Never more than one and one-half per cent of church members have been included in other than the twenty-seven major groups. Second, Protestants have always greatly outnumbered Catholics in Nebraska. Of the twenty-seven largest groups, the Roman Catholic Church has consistently been the largest single denomination, but, without exception, the combined member-

[4] *American Jurisprudence* (Rochester, New York, 1936-1948, 58 vols.), XI, 1100.

[5] These conclusions are based on the federal census reports of religious bodies for the years 1890, 1906, 1916, 1926, and 1936.

ship of the two largest Protestant groups (Methodists and Lutherans) has outnumbered the Catholics. Moreover, the six largest Protestant groups (Baptists, Congregationalists, Disciples of Christ, Lutherans, Methodists, and Presbyterians) in each of the census reports, with the exception of that of 1916, show a combined membership double that of the Roman Catholic Church. These comparative figures are even more meaningful when the definition of membership is taken into consideration. Roman Catholics consider all baptized persons as members, while most Protestant groups consider as members only those who have officially joined the church. Thus, children are included in Catholic membership figures and excluded from Protestant membership statistics. It is important to note, too, that the majority of those in the population who were not officially affiliated with any church normally considered themselves Protestants. Third, not only has there been a consistent increase in church membership, but percentagewise this increase has been more rapid than population increase.

Protestants, Catholics, and Jews differ somewhat in their attitude toward religious liberty and the relationship of church and state.

In theory at least, the Protestant insistence upon religious liberty and tolerance goes back to the sixteenth-century Reformation when emphasis was placed upon the priesthood of all believers. Unfortunately, at times, Protestant groups have been intolerant of beliefs differing from their own. Within the time limits of this study, for example, three major waves of anti-Catholic feeling have swept the United States: the Know-Nothing movement of the 1850s, the American Protective Association movement of the late nineteenth century, and the Ku Klux Klan movement of the second and third decades of the present century.

In general, however, during the period covered by this study there has been virtual unanimity of opinion among Protestant groups that religious liberty, buttressed by the separation of church and state, is desirable. Sometimes practice has not followed principle. For example, the demand for Bible reading in the public schools has usually been backed by Protestants and opposed by Catholics and Jews. In recent years, however, the most prominent of the non-denominational Protestant magazines, the *Christian Century,* has followed a policy of strong support for "separation of Church and State." Since 1948 a group of Protestant leaders organized into what is known as "Protestants and Others United for the Separation of Church and State" has been openly opposing what it considers the Catholic hierarchy's attempt to secure the church's union with the state in certain areas.

Most Protestants support the public school and oppose the use of public funds for parochial schools. The major non-Catholic group supporting parochial schools is the Missouri Synod of the Lutheran Church. The attitude of this group on the public aid issue was well stated in 1949 by Eugene Wengert in his Northern Nebraska District Convention Essay, entitled "The Interrelation of Church and State." He pointed out that

> any commitment to the political authority or any receipt of favors from the State must inevitably sooner or later destroy its [the church's] freedom of action and precipitate a conflict. . . . Not even so innocent a matter as receiving aid for its educational system in the transportation of its children or released time for religious instruction, and certainly not Federal aid for its schools, as now proposed in Congress, can be accepted without becoming involved in entangling alliances with the secularized, political forces.[6]

Even though they oppose public funds for parochial schools, many Protestants would like to see some constitutional system worked out for providing religious instruction in the public schools.

The Roman Catholic Church has had some difficulty adjusting itself to the American concept of religious liberty. In its long history it has developed a rather well-defined theory of church-state relationships, which is usually known as the theory of two powers.[7] This theory holds that "man has one ultimate purpose of existence," and that is "eternal happiness in a future life." While the state "exists to help man to temporal happiness," the purpose of the church is to help him attain eternal happiness. The church holds that

> of these two purposes the latter is more ultimate, man's greater good, while the former is not necessary for the acquisition of the latter. The dominating proximate purpose of man must be to earn his title to eternal salvation: for that, if needs be, he must rationally sacrifice his temporal happiness. It is clear, therefore, that the purpose of the Church is higher in the order of Divine Providence and of righteous human endeavor than that of the State. Hence, in case of direct collision of the two, God's will and man's need require that the guardian of the lower purpose should yield.

[6] *Northern Nebraska District Messenger,* XXV (December 1949), 47.

[7] The following analysis of the Catholic position is based upon a capable summary by Charles Macksey. See "State and Church," *The Catholic Encyclopedia* (New York, 1907-1912, 15 vols.), XIV, 250-254. The accuracy of the quotations is the responsibility of the author.

In line with the superiority of the purpose of the church over that of the state, "the judicial decision as to when a question does or does not involve spiritual matter," and therefore does or does not come within the jurisdiction of the church, "rests with the Church."

The Roman Catholic Church recognizes that "the duty of submission in a citizen of a State to the higher jurisdiction of the Church does not exist where the citizen is not a subject of the Church, for over such the Church claims no governing power." For juridical purposes "every human being that has validly received the Sacrament of Baptism" is subject to the church. Any subsequent falling away from the practices or membership of the church does not remove him from her jurisdiction.

While the Roman Catholic Church recognizes and respects "the rights of the State to govern its subjects in all purely temporal matters," nevertheless "the State is bound to recognize the juridical rights of the Church in all matters spiritual" and the state "is bound to render due worship to God." "Due worship," insists the church, "is that of the religion of Christ, entrusted to the care of the Church." It is the obligation of the state to protect and "to promote the spiritual interests of the Church."

In a mixed state, that is, one which has diverse religious groups such as the United States, the subordination of the state to the church is indirect. The church "directly reaches only its immediate subjects and indirectly through them the State which they constitute."

The church holds that a union of church and state "is in principle the normal and ethically proper condition for a truly Catholic State." It teaches that

> the essential idea of such union is a condition of affairs where a State recognizes its natural and supernatural relation to the Church, professes the Faith, and practices the worship of the Church, protects it, enacts no laws to its hurt, while, in the case of necessity and at its instance, taking all just and requisite civil measures to forward the Divinely appointed purpose of the Church—in so far as all these make for the State's own essential purpose, the temporal happiness of its citizens.

The church holds that between it and a non-Catholic state, separation, that is, "a condition of indifference of the State towards the Church, is to be expected." However, "*such a separation for a Catholic State would be criminal, as ignoring the sacred obligations of the State.*"[8]

[8] Italics supplied by the author.

It is statements such as the last which cause fear in some quarters that the Roman Catholic Church, with its conviction that it is the only legitimate church, may adopt and actively promote policies at variance with Protestant traditions.

While, as the above discussion would indicate, the ideal of separation of church and state does not recommend itself to Catholic theologians,

> today the overwhelming majority of our Catholic laymen believe in the separation of Church and State in the United States and in entire religious freedom; and the proportion of their clergy who would make any change in these provisions has probably decreased in recent decades.[9]

The Jews, a small minority in Nebraska, have benefited greatly from the American doctrines of separation of church and state and of religious liberty. Jews have wholeheartedly accepted the public school system. Their principal difficulties, in so far as religious freedom is concerned, have been with Sunday laws.

As the title of this study indicates, the major consideration will be to determine what the *legal* status of the church-state relationship in Nebraska has been. The major materials upon which the study is based are those to be found in a good law library. These are the legislative journals, the bills presented to the legislature, the session laws, the statutes, the constitutions, the opinions of the attorney general, the decisions of the state supreme court, and the pronouncements of the executive.

The term "separation" is not easily defined. In fact, one of the major purposes of this study is to throw some light on what has been traditionally called "separation." The term apparently has at least a twofold meaning involving both the freeing of the state from church control and the freeing of the church from state control.

The term "church" in this study is used loosely to refer to religious societies. It refers mainly to organized religious bodies led by the traditional Christian groups, but also includes the Jews and other groups of worshipers of God. The Nebraska Supreme Court has said that "the terms 'church' and 'society' are used to express the same thing, namely, a religious body organized to sustain public worship. The term 'church' imports an organization for religious purposes."[10]

[9] Anson Phelps Stokes, *Church and State in the United States* (New York, 1950, 3 vols.), III, 639.

[10] *In re Estate of Douglass,* 94 Neb. 280, 284 (1913).

The term "state" is herein used to refer especially to the State of Nebraska. It is not the intent of this study, in so far as the church-state relationship is concerned, to investigate local practice in detail. It is obvious, however, that local situations have resulted in the establishment of state policies by the legislature, the attorney general, and the supreme court. Thus, a study of the state policies does reveal local practice.

Since, in certain respects, Nebraska church-state relationships vary from those of other states there will be some attempt at comparison.

It has been necessary, in order that the scope of the study might be brought within workable limits, to exclude the investigation of the influence of religious bodies on social reforms. Therefore, such movements as those for woman suffrage, prohibition, control of gambling, limitation of child and woman labor, birth control, and pacifism are largely excluded from consideration.

The study which follows has as its purpose the determination of what has been the legal relationship of the church and the state in Nebraska over a period of 100 years. The subjects investigated in the following pages range from a description of the ways in which the state has regulated religious bodies to a discussion of the means by which religious bodies have been aided by the state. Because of the current interest in the relationship of church and state in education, special emphasis has been placed upon that subject. It is hoped that out of this investigation may emerge a clearer understanding of what has been the legal relationship of church and state in Nebraska and also of what would constitute a more desirable relationship of these two institutions.

2 / *State Recognition of Religion and Religious Freedom*

NEBRASKA, in its constitutions and in official statements by the various branches of its government, has publicly asserted belief in both the existence of God and the importance of religion. Such public recognition of belief in God and affirmation of the Christian religion are not opposed to the constitutional principle of religious freedom.[1]

Recognition of God has been accorded in the preamble of each Nebraska constitution by the expression of gratitude to Him. An attempt in the constitutional convention of 1871 to eliminate this portion of the preamble was voted down 44 to 2.[2] Nebraska constitutions have from the beginning stated that "religion, morality, and knowledge" are essential to good government.[3]

The Nebraska legislature has in various ways shown its concern for, and belief in, God and the Christian religion. This has, at times,

[1] Carl Zollmann, *American Church Law* (St. Paul, 1933), 31-34.

[2] See Addison E. Sheldon and Albert Watkins (eds.), *Official Report of the Debates and Proceedings in the Nebraska Constitutional Convention Assembled in Lincoln, June Thirteenth, 1871* (York and Lincoln?, 1906, 1907 and n. d., 3 vols. being also vols. 11, 12, and 13 of the *Nebraska State Historical Society Publications*), I, 522-523. This source will hereafter be cited as *Report of the Constitutional Convention of 1871.*

[3] For the current statement see *Constitution of the State of Nebraska of 1875, and subsequent Amendments,* Art. I, sec. 4. The various Nebraska constitutions will hereafter be cited simply as *Const.* followed by the appropriate article, section, and date. Since the major alterations in the constitution of 1875 necessitated a renumbering of articles in 1920, when citation is made to the Nebraska constitution as it has existed since 1920, both 1875 and 1920 will be indicated.

been accomplished through the passage of laws. Statutes have provided for chaplains of the legislative houses,[4] of state institutions, and of the militia. Statutory provision has been made for the use of oaths in various legal procedures to such an extent that over two pages of double-column fine print are necessary in the index to the state statutes merely to list references to them. The observance of both the Sabbath and certain other religious holidays is also provided by law. The law requires that the warden of the penitentiary furnish a Bible to each literate convict upon discharge. It also excludes the family Bible from attachment, execution, or sale by any court. At other times legislative concern has been made manifest through the wording of resolutions, adjournment for religious services, or the actual holding of religious services in the legislative halls.[5]

The Nebraska Supreme Court, too, has indicated its belief in the existence of God and the importance of religion. In 1892 the court stated that Sunday observance was based upon divine law.[6] In the same year it stated that "all free government is based on the divine law."[7] Three decades later the Nebraska court approvingly quoted the United States Supreme Court to the effect that all of the state constitutions either directly or by implication indicate "a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community." The nation's highest court concluded that "these, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."[8]

Many of the chief executives of Nebraska have repeatedly in public utterances indicated their belief in the existence of God. They have again and again invoked divine aid and guidance and have thanked God for the blessings bestowed upon the people of the state. Governor

[4] For the current statutes see *Revised Statutes of Nebraska, Reissue of Volume 3A, 1952* (Lincoln, 1952), secs. 50-111, and 50-120 and *Revised Statutes of Nebraska, Cumulative Supplement, 1953* (Lincoln, 1954), sec. 50-112. In 1944 the *Revised Statutes of Nebraska 1943* (Lincoln, 1944, 4 vols.) was published. This source will hereafter be cited as *R. S. 1943*. By the end of 1954 all of the volumes had been reissued and will be cited hereafter in this study as *R. R. S. 1943*. In 1954 the *Revised Statutes of Nebraska, Cumulative Supplement, 1953* (Lincoln, 1954) was published to make the reissued volumes current. It will hereafter be cited in this study as *R. S. C. S. 1953*.

[5] For example, see *Legislative Journal of the State of Nebraska 1943*, 1101-1102.

[6] *Oleson v. City of Plattsmouth*, 35 Neb. 153 (1892).

[7] *State v. O'Rourk*, 35 Neb. 614 (1892).

[8] *Church of the Holy Trinity v. United States*, 143 U. S. 457, 468 (1892), as quoted in *State, ex rel. Sorensen, v. Chicago B. & Q. R. Co.*, 112 Neb. 248, 256 (1924).

John H. Morehead when he vetoed a sterilization bill in 1913 gave as one of his reasons the belief that such legislation was "more in keeping with the pagan age than with the teachings of Christianity."[9]

Not only have the constitutions, the legislature, the courts, and the governors of the State of Nebraska indicated their belief in the existence of God and in the benefits of religion, especially the Christian religion, but there has been an effort actively to defend religion and religious freedom.

Central to the American tradition is the conviction that the individual should be free to worship as he pleases. The Federal Constitution makes provision for the protection of this right, and the state constitutions also contain various provisions respecting religious liberty.

Even prior to statehood, provision was made for the protection of the religious views of the inhabitants of what is now Nebraska. When the area was acquired from France in 1803, the treaty stipulated that the inhabitants of the vast area should be "protected in the free enjoyment of their liberty, property and the Religion which they profess" until they were accorded full citizenship rights. In 1854 when the Nebraska Territory was organized, religious freedom was assured by congressional provision that "the constitution and the laws of the United States" were to have the same force and effect there as elsewhere.[10]

Following the Civil War, Congress imposed certain requirements for admission on all new states. One such requirement was that conventions called to formulate the new constitutions were to make provision for an irrevocable ordinance. This ordinance was to provide for "perfect toleration of religious sentiment" so that no inhabitant of the state "shall ever be molested in person or property on account of his or her mode of religious worship." Nine states incorporated this ordinance in their constitutions while three more attached it as an independent document. The enabling act for Nebraska contained this provision, but, although it was neither specifically incorporated into the new constitution nor attached to it, Congress gave its approval to the constitution. It has been suggested that the require-

[9] *Senate Journal of the Legislature of the State of Nebraska 1913,* 937. This source will hereafter be cited as *S. J.* followed by the appropriate date.

[10] "An Act to Organize the Territory of Nebraska," as cited in *General Statutes of the State of Nebraska, Comprising All Laws of a General Nature in Force, September 1, 1873* (Lincoln, 1873), 45. This source will be hereafter cited as *G. S. 1873.*

ment was overlooked,[11] but it is more likely that the constitutional provision concerning religion was accepted as fulfilling it.[12]

The first Nebraska constitution made provision for the protection of religious freedom. It stated that all men had a natural and indefeasible right to worship God according to their consciences. Moreover, no one was to be compelled to attend or support any form of worship and no preference was to be given to any religious society. Finally, it imposed upon the legislature the duty of protecting all religious denominations.[13]

The Nebraska constitutional provision protecting religious freedom has remained substantially unchanged since 1866. When a new constitution was adopted in 1875, the provision guaranteeing religious liberty was taken over in almost identical form from the earlier constitution of 1866.

In a number of instances the religious freedom of individuals has been protected by the state legislature and courts. For example, when it is necessary to choose a guardian for a child, specific protection is provided for his religious views and those of his parents. Since 1905 Nebraska law has required that dependent children be placed in the custody of individuals or associations "of like religious faith of the parents of the child." In 1931 Justice Eberly wrote the opinion of the Nebraska Supreme Court in a case involving this issue. He pointed out that the general rule was that the religious views of the parent and child should be taken into consideration in the selection of a guardian. This procedure, he said, had been established as a public policy in Nebraska by legislative action.[14]

Employment discrimination because of race, color, and religion has also resulted in action aimed at protecting the freedom of the individual. The members of the Nebraska constitutional convention of 1919-1920 recognized the need for such protection when they provided that

> no religious test or qualification shall be required of teacher or student, for admission to or continuance in any public school or educational institution supported in whole or in part by public taxation.[15]

[11] Zollmann, *American Church Law*, 9-10.

[12] At least, the Nebraska Supreme Court in *State v. Buswell*, 40 Neb. 158 (1894) did not deny the binding effect of the enabling act.

[13] *Const.* Art. I, sec. 16 (1866).

[14] *State, ex rel. Bize, v. Young*, 121 Neb. 619 (1931).

[15] *Const.* Art. VII, sec. 11 (1875-1920).

On the basis of this constitutional provision the Nebraska legislature in 1937 made the preparation of any questionnaire, employment application, or information blank, or its delivery to applicants for teaching positions in the public schools unlawful if it contained any inquiry or reference to religious affiliation or religious belief of the applicant. During World War II the legislature passed a statute making unlawful the refusal to employ a person, if otherwise qualified, because of race, color, creed, religion, or national origin. The application of the statute was limited to those firms engaged in manufacturing and distributing military or naval material for the State of Nebraska or the United States Government.[16] An unsuccessful attempt was made in 1947 to broaden the application of this statute by dropping the provision limiting the application to firms engaged in military and naval production and distribution. The bill providing for the change was indefinitely postponed in the legislative committee on labor and public welfare. In the opinion of the majority of the committee, such a law would be unenforceable and discriminatory against employers.[17]

In 1945 Nebraska set up its merit system to insure impartial selection of qualified state employees. The statute specifically provides that no one will be disqualified from taking the examinations, from being appointed to a position, or from holding that position because of political or religious affiliation or opinion.

Voluntary contributions of individuals have been protected by the Supreme Court of Nebraska from diversion to objects other than those intended by the donors. In 1881 a number of people in Battle Creek were solicited by a Baptist minister for the building of a church to be used by the Protestants of the area. After two years those who had given the land for use of the church gave a quitclaim deed to three men who claimed to be the trustees of the church. These men proceeded to sell the property for use as a hardware store. Justice Maxwell, who wrote the opinion of the court, stated that a person who had given funds to aid in the construction of the building for a public purpose had a right to insist that it should not "without good cause be converted to other uses." He insisted that "a church organization, like any other, must act in good faith." Moreover, he said, if a church society may, without sufficient cause, sell the building for other purposes and those who had contributed to erect it were without remedy, "the power would be liable to great abuse." Said he, "no society possesses such power. Justice and right between individuals lie at the

[16] *R. R. S. 1943*, sec. 48-215.
[17] See *Nebraska Legislative Bill* 421 (1947).

foundation of the Christian religion, and this rule is as binding upon the various religious organizations as upon individuals." He therefore concluded that the plaintiffs had a right to enjoin the sale of the property.[18]

In 1943 the Nebraska Supreme Court supported the freedom of individuals to advertise their religion. A Lincoln city ordinance prohibited the operation or parking of any advertising vehicle on the streets of the city. The ordinance specifically permitted advertising on ordinary business vehicles engaged in the usual business of the owner and not used primarily for advertisement. Roy Hind had been arrested and convicted for advertising a religious meeting on his car. Justice Carter, writing the opinion of the court, held that when Hind was arrested he was at his regular business and advertising was not the primary use of the car. The court, therefore, reversed the decision of the district court.[19]

Often the religious practices of minority groups have been frowned upon by the majority. It has then been necessary for those minority groups to insist upon the right to practice their religion as they see fit.

From the earliest territorial days Jews and others who prefer to observe Saturday rather than Sunday as their Sabbath have found support in the laws of Nebraska.[20] Likewise, those who prefer an affirmation to an oath have found support in Nebraska law. It has been provided from the beginning that "whenever an oath is required by this code, the affirmation of a person conscientiously scrupulous of taking an oath, shall have the same effect."[21] The highest court of the state has upheld the right of a witness to affirm rather than to take the usual oath.[22]

Some other religious minorities have not found as ready acceptance of their practices and modes of worship. Among the minority religious

[18] *Avery v. Baker,* 27 Neb. 388 (1889).

[19] *State v. Hind,* 143 Neb. 479 (1943).

[20] Compare *Laws . . . of the Territory of Nebraska . . . 1855,* (1st Sess.), 146, which protects such observance, with *R. R. S. 1943,* sec. 28-940, which removes Sunday common labor restrictions from those who conscientiously observe Saturday. Laws of the Nebraska Territory will hereafter be cited as *Terr. Laws* followed by the appropriate date. Since there were two sessions in both 1855 and 1857, to avoid confusion the number of the sessions will be indicated when citing the laws of these years. The laws of the territorial and early statehood periods were not divided into chapters and they will be cited by page throughout this study.

[21] *Revised Statutes of the Territory of Nebraska in Force July 1, 1866 . . .* (Omaha, 1886), 549. This source will hereafter be cited as *R. S. 1866.*

[22] *Wilcox v. State,* 46 Neb. 402 (1895).

groups experiencing difficulties in Nebraska have been the Christian Scientists, the Spiritualists, and various groups using foreign languages.

In 1891 the Nebraska legislature increased the requirements for medical practitioners. Thenceforth it was to be illegal for individuals to practice medicine unless they were graduates of medical colleges and licensed by the state board of health. Anyone who operated, professed to heal or prescribe for, or otherwise treated any physical or mental ailment of another was construed to be practicing medicine.[23]

The statute regulating medical practitioners was a direct challenge to the Christian Scientists. The Church of Christ, Scientist, more commonly known as the Christian Science Church, teaches that all cause and effect is mental and that sin, sickness, and death will be eliminated by an understanding of Jesus' teachings. In 1894 a case involving the law regulating medical practitioners was brought before the Nebraska Supreme Court. Ezra M. Buswell, a Christian Scientist, had been indicted for practicing Christian Science in violation of the statute. He had been acquitted by the district court. Commissioner Ryan, who wrote the opinion of the court, opened with the statement that "perfect toleration of religious sentiment, and enjoyment of liberty in all religious matters is of paramount importance." In the lengthy opinion he quoted freely from the brief filed by Buswell "lest the contention of the defendant may be misunderstood or imperfectly stated in our own language." The brief described the use of prayer and persuasion as a means of healing. It contended that the classifying of such practices as violations of the law regulating medical practice would deny the constitutional provision guaranteeing all persons the right to worship God according to the dictates of their own conscience. In addition, it was claimed, it would violate the provision of the enabling act which had required perfect toleration of religious sentiments.

The court was not impressed by the arguments of Buswell. Commissioner Ryan indicated that Buswell had admitted taking pay for his services as a healer. The commissioner cited scripture to indicate that in reality Buswell was guilty of simony, for the gift of the spirit should not be sold for money. "In the light of these instances, cited from the defendant's own authority," he continued, "it is confidently believed that the exercise of the art of healing for compensation . . . cannot be classified as an act of worship." Moreover, "neither is it the performance of a religious duty." The commissioner also

[23] *Laws . . . of the State of Nebraska . . . 1891,* c. 35. This source will hereafter be cited as *Laws* followed by the appropriate date.

noted that a considerable part of Buswell's brief was devoted to attacking "the established and recognized modes of treatment in the cure of diseases" as compared with his own method.

Commissioner Ryan concluded that it was not necessary, as the district court had held, that Buswell be found guilty of practicing medicine, surgery, or obstetrics as generally or usually understood. The purpose of the statute in question, he said, was the protection of the afflicted from the "ignorant and avaricious." Its provisions, he felt, should not be "limited to those who attempt to follow beaten paths and established usages" but should be applied even more stringently against "pretensions based upon ignorance . . . and credulity."[24]

Six years later the court had not changed its opinion. It stated that it was "fully satisfied" with the rule announced in *State v. Buswell,* although it was possible that decisions in some other courts were in conflict with it.[25]

During the first two decades of the present century the Christian Scientists worked diligently but unsuccessfully for an amendment of the statute which limited the practice of their faith. In 1901 bills were introduced in both houses of the legislature to exempt from operation of the law persons treating illness through mental or spiritual means and without administration of drugs.[26]

The opponents of relaxing the limitations upon Christian Scientists pushed a bill through the legislature in 1905. It was aimed at making the practice of Christian Science healing unlawful and at providing for the punishment of practitioners unless they educated themselves in the various branches of the secular medical profession. Governor Mickey brought the wrath of the state medical society down upon his head by vetoing the bill. He gave as his reasons the form of the bill; the fact that it specifically exempted osteopaths and was thus class legislation; and its denial of the constitutional right of freedom of worship. He suggested that, although he did not wish to reflect upon the motives of the legislature, it was difficult to avoid the conclusion that the bill was "conceived in a spirit of professional intolerance." He added that since various other schools of healing had found it necessary to overcome "legal barriers raised by their professional brethren"

[24] *State v. Buswell,* 40 Neb. 158 (1894).

[25] *Little v. State,* 60 Neb. 749 (1900).

[26] *Nebraska Senate File* 194 (1901) and *Nebraska House Roll* 267 (1901). Hereafter these sources will be cited as *S. F.* and *H. R.* respectively.

he suspected that there was "more at issue than a consuming zeal for the public health."[27]

Identical bills, introduced but not passed in 1907, would have defined Christian Science healing, provided for the examination of practitioners, and regulated the practice of such healing. Another bill would have regulated the practice of Christian Science so far as it related to the treatment of contagious diseases.

Various attempts were made in succeeding years to amend the definition of medical practice in favor of Christian Science methods. Bills for this purpose were introduced in 1911 and again in 1913. Another bill introduced in 1919 would have specifically exempted persons practicing Christian Science from being considered as practicing medicine if they did not prescribe or administer drugs, perform operations, or "hold themselves out to be physicians or surgeons." They were not, however, to be exempt from the quarantine laws of the state. Meanwhile, the legislature, in 1915, removed members of religious societies performing gratuitous nursing from the group of nurses required to be registered and certified.[28]

Finally, in 1921 the long battle for freedom to worship as they saw fit was won by the Christian Scientists. At that time an act substantially the same as the bill of 1919 was finally passed.[29] The law in 1954 provided that among those not to be considered as practicing medicine or surgery were

> the members of any church practicing their religious tenets; *Provided,* they do not prescribe or administer drugs or medicines, perform surgical or physical operations, nor assume the title of, or hold themselves out to be, physicians or surgeons; *and provided, further,* that such members shall not be exempt from the quarantine laws of this state. . . .[30]

The legislature, passing in 1927 a basic science law which regulated those practicing the various healing arts, excluded from its application "the practice of their religious tenets by members of any church" if they did not attempt to heal through the use of medicine, and did not operate or claim to be physicians.[31]

[27] For Governor Mickey's veto message see *House Journal of the Legislature of the State of Nebraska 1905,* 1103-1105. Hereafter this source will be cited as *H. J.* followed by the appropriate date.

[28] *Laws 1915,* c. 198.

[29] *Laws 1921,* c. 251.

[30] *R. R. S. 1943,* sec. 71-1,103.

[31] *Ibid.,* sec. 71-416.

The Christian Scientists of Nebraska thus secured the removal of the legal prohibition of their practices in 1921. They were still faced, however, with the possibility of enforced participation in practices, such as compulsory immunization, which are contrary to their religious beliefs. As a result, efforts were made to ensure freedom of choice in medical matters. For example, in 1923 an unsuccessful attempt was made to prevent public officials from interfering with the freedom of choice of any person either for himself or for anyone under his care or control, in all matters relating to the prevention, treatment, or cure of disease. In the same session a law which required public school teachers to examine each child for certain physical defects was amended to provide that no child should be compelled to submit to a physical examination by other than the teacher if the parent or guardian had delivered a written objection to the teacher. Such an objection, however, did not exempt the child from the quarantine laws of the state or prohibit examination for infectious or contagious diseases.[32]

The issue of compulsory immunization has apparently not been before the Nebraska Supreme Court, but the attorney general gave an opinion on the matter in 1950. Nebraska law gives each school board the power to make the rules and regulations it deems necessary for the government and health of the pupils. With this in mind the department of public instruction requested an opinion as to whether pupils could be required by a board of education to present proof of vaccination for smallpox and immunization against diphtheria, subject to the exception that such requirement be waived in the case of children whose parents objected for religious reasons. The attorney general suggested that only where there were "medically significant circumstances furnishing grounds for a reasonable belief that compulsory measures should be taken to prevent the introduction and spread of contagious disease" should such a requirement be imposed. He stated, however, that such action would be an exercise of the police power in the interest of public health. Therefore, exceptions could not legally be made for children whose parents objected on religious grounds.[33]

The possible addition of fluorine to the water supply of certain Nebraska cities has also been a matter of concern to the Christian Science group. It might be assumed, however, that such action can

[32] *Laws 1923*, c. 55.

[33] *Report of the Attorney General of the State of Nebraska for the Period from 1949 to 1950 inclusive*, 900-902. The biennial reports of the attorney general will hereafter be cited as *Rep. Att'y Gen.* followed by the last year of the biennium.

legally be taken under the police power in the interest of public health.

The Spiritualist Church is another minority group whose right to worship as it pleases has sometimes been questioned. By a law of 1911 it was made illegal to participate "in giving a public, open exhibition or seance or show of hypnotism, mesmerism, animal magnetism or so-called psychical forces for gain." In 1940 a case involving this statute was brought before the Nebraska Supreme Court. It was claimed that there had been illegal interference with religious seances conducted by John Dill, a spiritualistic medium. By such interference, it was claimed, Dill and the other plaintiffs, as members and officers of the Spiritualist Church, had been deprived of their constitutional right to freedom of religious worship. They contended that the Spiritualist Church was a sectarian church which worshiped God according to the word of the Bible; that seances were among the most formal and solemn religious services of their church; that a medium was one through whom messages could be conveyed from the spirit world; and that the pay of a medium for conducting a religious seance was "the authorized, guaranteed, fixed sum of $15 to be raised by voluntary contributions" of those present at the religious meetings.

Justice Rose, who wrote the opinion of the court, pointed out that the statute in question did not prohibit spiritualistic seances unless they were public, open, and for gain. The statute, he stated, does not make seances criminal. It is rather an exercise of the police power to prohibit public performances for money-making purposes which are harmful, immoral, or indecent, even though conducted in the name of religion. Since the seance in question was not a public performance and since the remuneration of fifteen dollars for the medium did not amount to "gain" within the meaning of the statute, it was the opinion of the court that Dill and the other plaintiffs were only exercising their constitutional right of freedom of worship.[34]

In the period during and immediately following World War I considerable feeling was aroused against anything which might be considered as foreign in contrast to American. As a result, a series of Americanization acts was passed by the Nebraska legislature to limit and, if possible, eliminate what were considered foreign influences. The issue of religious freedom became entangled in the anti-foreign controversy. One issue involved was the freedom to choose a pastor. Since many congregations composed of persons of foreign, especially

[34] *Dill v. Hamilton*, 137 Neb. 723 (1940).

German, extraction habitually used the foreign language for religious instruction and in their religious services, a pastor capable of using the language was desired.

A special session of the Nebraska legislature in 1918 passed a sedition act which provided that any person falling under its provisions might not serve as a "teacher, lecturer, minister, preacher, or priest, or instructor in any capacity during the period of the war."[35] It provided also that those classified as alien enemies might not serve in the above capacities without first being investigated and receiving a permit from the district court of the county of their residence. This last provision, in the opinion of the attorney general, made it impossible for a loyal enemy alien resident in Iowa to preach occasionally in Nebraska.[36] Similarly, the attorney general advised that the German congregation of the Roman Catholic church at Snyder might not be served by a priest to whom the district court had refused to issue a permit. This was true even though the services most desired were the mass, performed in Latin, which no member of the congregation understood, and the two rites of baptism and extreme unction.[37]

It was not surprising that the Nebraska Americanization program resulted in considerable confusion as to how foreign languages might legally be used by religious groups. Governor Samuel R. McKelvie in his inaugural address in 1919 advocated that all instruction in the schools be conducted in English. He commented that "religious freedom should not be abridged, but the churches should also be used as a medium through which the use of the English language may be aided and encouraged."[38]

The legislation passed in 1919 added to the confusion. It was provided that all public meetings were to be "conducted in the English language exclusively." However, "meetings or conventions held for the purpose of religious teachings, instruction or worship, or lodge organizations" were specifically exempted from the operation of the law.[39] The same year saw the passage of an act aimed at eliminating the use of foreign languages in the "private, denominational, parochial or public school."[40]

As a result of this situation, the attorney general was called upon several times to express his opinion relative to various uses of foreign

[35] *Laws 1918*, c. 5.
[36] *Rep. Att'y Gen. 1918*, 204-205.
[37] *Ibid.*, 194-195.
[38] *S. J. 1919*, 32-33.
[39] *Laws 1919*, c. 234.
[40] *Ibid.*, c. 249. This aspect of the problem is discussed in Chapter VIII.

languages. For example, in June, 1918, even before the passage of the above legislation, he advised the Rev. Mr. J. J. Meyer that there was no law prohibiting the teaching of Sunday school or preaching in the German language. He warned, however, that where public opinion opposed certain actions, even though no legal prohibition exists, it would be wiser to omit them. Otherwise, he indicated, laws almost certainly would be enacted "to meet the general will of the public." Moreover, bad feeling quite contrary to the religious teaching of brotherly love would develop in the community over questions of loyalty and disloyalty. In any case, he insisted, the younger people to whom the church must look should acquire knowledge of the Bible through the English language. He concluded that "teaching in the Sunday school and preaching should be in the English language" and he expressed hope that the congregation would conform.[41] In May, 1919, the attorney general expressed the opinion that the foreign language act did not prohibit the teaching of the German language in a Sunday school where its purpose was the preparation of "the pupils to receive religious instruction in that tongue."[42] In October of the same year, however, he had apparently changed his view, for he indicated that in his opinion if some members of a confirmation class had not passed the eighth grade, it would be unlawful to teach such a class in the German language.[43]

The Nebraska controversy over the use of foreign languages by religious groups involved their use in parochial schools as well as in churches. In 1923 the United States Supreme Court decided that the Nebraska law prohibiting the use of foreign languages in the schools violated the Fourteenth Amendment and was therefore void. [44] The Nebraska Supreme Court shortly thereafter, in a case involving the use of a foreign language in a religious meeting, cited the decision of the United States Supreme Court and held the controversial Nebraska legislation unconstitutional.[45] These decisions ended the legal opposition to the use of foreign languages by religious groups in Nebraska.

It would appear, then, that minority groups have sometimes had to fight for the right to worship as they please. In Nebraska the Christian Scientists, the Spiritualists, and the various foreign language groups have won their battles for freedom of worship. This is a con-

[41] *Rep. Att'y Gen. 1918,* 200-202.
[42] *Rep. Att'y Gen. 1920,* 228-230.
[43] *Ibid.,* 230-231.
[44] *Meyer v. State of Nebraska,* 262 U. S. 390 (1923).
[45] *Busboom v. State,* 110 Neb. 629 (1923).

tinuing struggle, however, and it is never completely won. Other problems involving minority religious groups and their freedom of worship are treated elsewhere in this study.

While certain minority groups have in the past found it necessary to fight for the right to worship as they please, a special effort has been made in Nebraska to protect freedom of religious worship in general. The state has set up regulations aimed at maintaining, around churches, an environment conducive to worship and at protecting religious worship from intentional interruption.

The first session of the Nebraska territorial legislature recognized the probable disruptive effect of the sale of liquor near a camp meeting where emotions might be expected to be at a high pitch. It prohibited, therefore, the sale of liquor within one mile of any such meeting. Exempted from the operation of the law were those who were carrying on their regularly licensed businesses. Sales of prohibited articles might be made, the law provided, within the one-mile limit if a written permit were procured from the person in charge of the religious meeting.[46]

The statute was apparently interpreted only once by the Nebraska Supreme Court. The court found that the purpose of the statute was neither to interfere with the police regulations of a city or village nor to grant a monopoly of the sale of food and drink to those managing the camp meeting. Rather, its only purpose was to prevent disturbance of the meeting.[47]

In 1889 a bill was introduced to prevent saloons, liquor houses, and houses of prostitution from being established within 600 feet of any church, school, or university. The legislature, however, preferred to leave that matter to local option.

In 1935, after the demise of both the camp meeting and prohibition, the legislature provided that no licenses should be granted for the sale at retail of alcoholic liquor within 150 feet of any church, school, hospital, home for the aged, indigent, or veterans, or of any military or naval station. Specific exemption from the operation of the law was provided for various eating establishments where the sale of liquor was not the principal business if they were established for such purposes prior to May 24, 1935.[48] Exemption from the operation of the law was also granted in 1947 to any establishment within the 150-foot

[46] *Terr. Laws 1855,* (1st Sess.), 247.
[47] *Ex parte McNair,* 13 Neb. 195 (1882).
[48] *Laws 1935,* c. 116, sec. 35.

limit which had been granted a license by the Nebraska Liquor Control Commission for two years continuously prior to making application for the license.[49]

While this statute has not been interpreted by the highest court of the state, the attorney general has clarified its meaning. In 1936 he advised that the sale of liquor in a cafe within 120 feet of a church was possible only if such sale was not the principal business and if the restaurant had been established prior to the time the liquor law went into effect.[50] In 1950 he expressed his opinion that while the Peoples City Mission in Lincoln was not a church because there was no regular and "well defined group" which met there, nevertheless it was a home for "indigent persons" and therefore sale of liquor within 150 feet was prohibited.[51]

Not only have activities in the area around places of religious worship been regulated but provision has also been made to protect the meeting itself from intentional disruption. The first session of the territorial legislature provided imprisonment and fines for those who willfully disturbed a religious worship service by rude and indecent behavior, or by noise. Although amended during the intervening century, the statute remains substantially the same.[52] The Nebraska court has been called upon to clarify the meaning of this statute at least twice. Each time the court has been careful to protect the religious rights of the individual.

In 1890 the court was asked to determine whether a disruption of a religious meeting by two men who had been expelled from membership of the church was one prohibited by the statute. While the court refused to justify the conduct of the two men, it insisted that a church society was a voluntary organization and that

> there must be freedom of individual thought, and in respectful language, expression to such thoughts. It may be presumed that no sincere follower of the Master will so far forget his duty as to indulge in railings or unjust accusation. The right of membership is a valuable privilege of which no one should be debarred, except for adequate cause, shown either by the rules of the society or after a fair examination of the charges, after due notice. As neither of those things appear to have taken place, the order of expulsion would seem to be void.[53]

[49] For the statute as of 1954 see *R. R. S. 1943,* sec. 53-177.
[50] *Rep. Att'y Gen. 1936,* 157-158.
[51] *Rep. Att'y Gen. 1950,* 801-803.
[52] *R. R. S. 1943,* sec. 28-801.
[53] *Jones v. State,* 28 Neb. 495 (1890).

The case was therefore remanded for further proceedings.

Again in 1920 this statute was clarified by a decision of the Nebraska Supreme Court. Alpheus Gaddis had been fined under the statute for disturbing a religious service in a Christian church. In the midst of a sermon on communion the pastor had stated that deacons, in conducting a communion service, had the right to pass by a member they believed unworthy. Gaddis had interrupted the sermon and had pointed out to the congregation that such a doctrine was in opposition to the beliefs of the church. Justice Rose, writing the opinion of the court, agreed that a religious meeting had been interrupted but stated that it had been done in a becoming manner and with good motives. Moreover, said the justice,

> a member of a religious society, if permitted by its precepts and usages, may . . . interrupt a minister to correct utterances at variance with established tenets or rites. Otherwise freedom of worship and free speech might be impaired by bigotry and false doctrines.[54]

The justice indicated that the defendant no doubt felt that silence would imply his consent to a doctrine depriving others of the sacred right of communion on the mere belief of the deacons. "Undisputed evidence," continued Justice Rose, "shows that the utterance of the minister, when interrupted, was contrary to the doctrines of his church." It also shows, stated the justice, "that the defendant as a member thereof was within his rights in interrupting the meeting to correct the mistake." Therefore, since no established rule, usage, doctrine, or rite of the Christian Church had been violated, the defendant was within his rights and had not disturbed a religious meeting under the meaning of the statute.

The property of religious groups, like that of individuals or other groups, has long been protected by Nebraska law. According to the criminal code adopted in 1873, churches were among those buildings specifically protected from breaking and entering.[55] The same code provided general protection of property and also specific protection of church edifices, schoolhouses, and other buildings from vandalism.[56]

[54] *Gaddis v. State,* 105 Neb. 303 (1920).

[55] *G. S. 1873,* c. 58, secs. 48, 49, 53. The provisions of these sections are substantially retained in *R. R. S. 1943,* secs. 28-532 and 28-533.

[56] *G. S. 1873,* c. 58, secs. 108 and 111. These provisions are substantially retained in *R. R. S. 1943,* sec. 28-578 and *R. S. C. S. 1953,* sec. 28-572.

In 1949 the Nebraska Supreme Court was called upon to interpret these statutes with respect to church property.[57] Lloyd Pauli had destroyed property of Our Lady of Guadalupe Church in Scottsbluff, which belonged to the Diocese of Grand Island. He had done so, said Pauli, because he "was against the form of worship conducted in the church." Pauli had been charged and convicted under the general statute controlling vandalism. This provided a penalty of from one to three years in the penitentiary or a fine not exceeding $200 or imprisonment not exceeding six months in the county jail.[58] In his appeal Pauli claimed that if he were prosecuted at all, it should have been under the statute specifically protecting church property which carried as penalty only a fine not exceeding $100.[59] The court felt a substantial distinction existed between the offenses defined in the two statutes. It therefore upheld the district court in finding Pauli guilty of the more serious violation.

It would seem from the above survey that in Nebraska the state has by no means been completely divorced from religion. Agencies of the state in official pronouncements have asserted the existence of God and the importance of religion to the state. Religious liberty has been guaranteed in the Nebraska constitutions and laws. While certain minorities have at times been forced to fight for freedom to worship as they please, religious liberty has in general been protected in Nebraska.

Religious freedom is not something which can be concisely and completely defined once and for all. Rather, it is a vital growing concept which must continually be adjusted to meet new situations as they arise. In a sense, this entire study is concerned with the efforts to ensure freedom of religion. The establishment of the proper relationship between church and state usually requires a determination of how certain policies will affect the religious freedom of individuals and groups. It is the manner in which this problem has been faced in various situations by the executive, the legislature, and the courts of Nebraska which it is proposed to investigate in the remainder of this study.

[57] *Pauli v. State,* 151 Neb. 385 (1949).
[58] *R. S. C. S. 1953,* sec. 28-572. *Laws 1953,* c. 83 increased the penalty.
[59] *R. R. S. 1943,* sec. 28-578.

3 / *Privileges Accorded to Religious Groups by the State*

WHILE benefit of clergy was "forever abolished" by Nebraska's first criminal code,[1] throughout the history of the state various privileges have been accorded men of the cloth. They have, for example, been exempt from military duty and jury service and have been accorded special consideration in visiting prisoners, serving as witnesses, and receiving railroad passes.

Ministers have traditionally been exempt from military service in Nebraska. In 1862 the Nebraska territorial legislature provided for the organization of all males of military age into volunteer companies for regular drill. This act exempted "all clergymen in regular standing in the different religious denominations" in the territory. An act of 1870 which authorized the raising of troops for extraordinary occasions made no exceptions for ministers. The law was amended in 1877 to exempt from military duty, after proper proof, "all persons who are members of any religious society or organization by whose creed or discipline the bearing of arms is forbidden." This law was apparently unsatisfactory, for in 1881 the specific exemption for members of religious organizations was eliminated. In 1905, however, "ministers of the gospel" were again included among those exempt from liability to militia duty and this exemption was still in effect in 1954.[2]

[1] *R. S. 1866,* 633. Similar provision was made earlier in *Terr. Laws 1858,* 77.
[2] *Laws 1905,* c. 100, sec. 1. See also *R. S. C. S. 1953,* sec. 55-106.

Nebraska clergymen have also been exempt from jury duty. The Iowa code, adopted by the first Nebraska territorial legislature, exempted clergymen from jury duty. In 1866 the law of the new state provided that "ministers of the gospel" should not be compelled to serve as jurors. Although the statute regulating membership of juries has been amended several times, the current statute still exempts ministers from jury duty.[3]

Exemptions from some duties imposed upon other citizens are not the only privileges accorded ministers in Nebraska. For example, ministers have special privileges with prisoners. The territorial legislature in its first session listed the persons who were authorized to visit the penitentiary. Included were "all regular officiating ministers of the gospel." The act of 1870 which authorized the erection of a penitentiary contained a provision, still on the statute books, which stated that "regularly authorized ministers of the Gospel" might visit the penitentiary at pleasure.[4] Also, from the earliest days of the territory the law has explicitly listed those who may be present at executions. Provision has always been made for the presence of a minister if desired by the prisoner.[5]

Communications made to clergymen are "privileged" in Nebraska. Throughout its history Nebraska law has provided that among those incompetent to serve as a witness is

> a clergymen or priest, concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession.[6]

The law has also provided since the earliest days of the territory that

> no practicing attorney, counselor, physician, surgeon, minister of the gospel or priest of any denomination, shall be allowed, in giving testimony to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline.[7]

[3] *R. S. C. S. 1953,* sec. 25-1601.
[4] *Laws 1870,* 33. *R. R. S. 1943,* sec. 83-452.
[5] *Terr. Laws 1855,* (1st Sess.), 291. See also *R. R. S. 1943,* sec. 29-2506.
[6] *R. S. 1866,* 449. See also *R. R. S. 1943,* sec. 25-1201 which reads exactly the same.
[7] *Terr. Laws 1855* (1st Sess.), 134. See also *R. R. S. 1943,* sec. 25-1206. Sec. 25-1207 provides for waiver.

The meaning of the statutes providing privileged communications for clergymen was clarified by the Nebraska Supreme Court in 1901. Rowland P. Hills, a minister at Blair, had been convicted of bigamy in the district court. In his appeal to the supreme court Hills claimed that an error had been made by the lower court when it permitted a privileged communication to be admitted as evidence. The privileged communication, he claimed, was a piece of paper upon which he had noted items to be relayed to his first wife by the Reverend Mr. A. T. Young, the rector of the Episcopal church in Blair. The admission of this evidence, he said, violated the statute prohibiting testimony by a minister concerning confidential communications.

Chief Justice Norval commented that "to render a communication to a minister of the gospel or priest privileged it must have been received in confidence." To be made in confidence, the chief justice continued, meant that the communication was made "with the understanding, express or implied, that it should not be revealed to anyone." Mere communication to a privileged person did not in itself make the communication privileged. The court felt that there had been no privileged communication in this case. The Reverend Mr. Young had been requested by Hills to relay the message to another and had, therefore, in no way betrayed confidence by revealing the contents of the paper.

The chief justice could not resist closing the opinion with a verbal spanking for Hills. Said he:

> The defendant is a clergyman, "a teacher of high and noble precepts," and yet the record before us discloses that he has violated one of the Ten Commandments and the teachings of Holy Writ. The jury have found him guilty, and the verdict is manifestly right.[8]

A privilege of considerable value to the clergy which has been widely granted by the various states is reduced fare or free passes on the railroads.

The provisions of the Nebraska constitution of 1875 regulating the railroads reflect the Granger influence of the period. The constitution included a lengthy section prohibiting passage of special laws by the legislature[9] and added an entirely new article on the regulation of the railroads.[10] Among other things, this article gave the legislature

[8] *Hills v. State*, 61 Neb. 589, 600 (1901).
[9] *Const.* Art III, sec. 15 (1875).
[10] *Ibid.*, Art. XI.

power to "pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph and railroad companies" in the state.[11] One of the abuses and discriminations frequently complained of was the free-pass system. By giving public officials and their families free transportation, railroad corporations exercised influence over them. The historian of the Granger movement comments that "to say that no return was expected from this munificence is absurd."[12]

In 1907, when the "use of the free pass had become an intolerable evil, a menace to good government, and a stumbling block in the way of securing needed legislation, as well as a burden to the railroad companies themselves,"[13] the Nebraska legislature moved vigorously to correct the situation. The new railway commission act included a provision prohibiting the collection "from any person, firm, or corporation, a greater or less compensation" for services than it collected "from any other person, firm, or corporation for doing a like and contemporaneous service."[14] The legislature realized after passage of this act that it had made unlawful the giving of free transportation to everyone, including railroad employees while carrying out the terms of their employment. Thus, the law was too drastic and three days after its passage another law was enacted to provide certain exceptions to the earlier law in the interests mainly of the employees of the railroads.[15] Ministers and others, to whom passes had commonly been granted, were not included in the exceptions of the new law. A test case involving the issuance of a pass to a physician was immediately initiated in the courts. The supreme court decided that the anti-pass law was a reasonable exercise of the police power of the state.[16]

Following World War I considerable pressure was placed upon the legislature to enlarge the group to whom free passes might be given. In 1923 the legislature amended the statutes to permit free passes to

> ministers of religion, traveling secretaries of Railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions and persons exclusively engaged in charitable and eleemosynary work.[17]

[11] *Ibid.*, sec. 7.
[12] Solon J. Buck, *The Granger Movement* (Cambridge, Mass., 1913), 13.
[13] *State v. Martyn*, 82 Neb. 225, 228 (1908).
[14] *Laws 1907*, c. 90, sec. 14. This portion of the act was almost an exact copy of the comparable section in the Federal Interstate Commerce Act of 1887.
[15] *Laws 1907*, c. 93.
[16] *State v. Martyn*, 82 Neb. 225 (1908).
[17] *Laws 1923*, c. 160.

The change in the law was challenged and the Nebraska Supreme Court was called upon to determine its constitutionality.[18] The court was requested to enjoin issuance of free passes to ministers and persons engaged in charitable work. The claim was made that there was no reasonable basis for classification of such people in the group eligible for free passes since they occupied the same space, cost the same to transport, and rendered the railroads no greater service than other classes of people "such as farmers, school-teachers, newspaper editors and writers, common laborers, or lawyers." The statute, it was declared, was unconstitutional under both the Nebraska and Federal constitutions. It was asserted that the act violated the provision of the state constitution prohibiting special legislation and also the provision preventing unjust discrimination in charges of railroad companies. Likewise, it was charged, the Fourteenth Amendment of the Federal Constitution was violated.

Justice Letton, who wrote the opinion of the court, briefly reviewed the history of railroad abuses. The Federal Interstate Commerce Act of 1887, he said, was "the result of the desire to end such conditions." Its provisions for ending unjust discrimination had been incorporated into Nebraska law by the legislature in 1907. The federal act, however, had included ministers of religion among those eligible to receive reduced rates. In 1889, he pointed out, destitute and homeless persons and the necessary agents for their transportation had been added by the Congress to those eligible to receive reduced rates. Moreover, he said, the Nebraska anti-pass law of 1907 was substantially copied from the Federal Interstate Commerce Act. When it had been introduced into the legislature as *Senate File* 2, he noted, it contained provisions allowing preference to ministers of religion and charitable workers. These provisions were eliminated in passing through the legislature. Thus, the act of 1923 merely amended the original act by restoring the provisions making ministers and charitable workers eligible for passes.

Justice Letton indicated that it was "unjust discrimination" which the Nebraska constitution prohibited. After citing the United States Supreme Court in support of his view,[19] he stated that the court could "see no reason why a railroad corporation may not, to a reasonable extent, donate funds or services to aid in good works."[20] He buttressed his conclusion by pointing out that a large majority of the states per-

[18] *State, ex rel. Sorensen, v. Chicago B. & Q. R. Co.,* 112 Neb. 248 (1924).

[19] *Interstate Commerce Commission v. Baltimore and Ohio Railroad Co.,* 145 U. S. 263, 278 (1892).

[20] *State, ex rel. Sorensen, v. Chicago B. & Q. R. Co.,* 112 Neb. 248, 256 (1924).

mitted free passes to be issued to ministers. Then, too, he indicated, the state had a real interest in furthering religion. Not only did the constitution of the state declare "religion, morality and knowledge" essential to good government, but "as a general rule the legislatures of the several states [had] recognized that religious and charitable organizations [were] potent factors for good." "In fact," stated the justice, "were it not for organizations of this nature, the moral and domestic virtues might largely escape inculcation in this age of haste and hurry and relaxation of parental discipline." Exemption of the property of religious and charitable organizations from taxation was recognition of their service to the state. After again citing the United States Supreme Court, this time to the effect that the United States was a Christian nation,[21] he concluded that sufficient grounds existed "for a classification by the legislature placing ministers of the gospel and charitable workers in a different class from ordinary passengers."

The justice closed the opinion of the court by pointing out that both a constitutional convention and successive legislatures had been held since the passage of the anti-pass law in 1907. Although opportunity was thus frequently offered for the addition of further restrictions on passes, no such action had been taken. By the lack of such action, the justice felt, the people had given their support to the interpretation of the legislature and courts that discriminations of the nature involved in the case in question were not unjust. The act granting the pass privilege to ministers and charitable workers was, therefore, constitutional.[22]

Religious societies, as well as their ministers, have been accorded certain privileges in Nebraska. Privileges have included the use of fermented wine in religious ceremonies; marriage of members according to the practices of the group; protection from the use of profanity on the part of others; and certain provisions relative to property holding.

Some religious groups believe that the use of fermented wine is necessary for sacramental purposes. The State of Nebraska has placed special provisions in its liquor control laws to aid these groups. Thus, before, during, and after prohibition, certain religious groups were accorded special privileges.

The Nebraska legislature in 1889 passed a comprehensive law regulating the sale of liquor. This law provided that licenses were not necessary for physicians or druggists holding permits for the sale of liquors for medicinal, mechanical, chemical or sacramental purposes.

[21] *Church of the Holy Trinity v. United States,* 143 U. S. 457, 468 (1892).

[22] For the current applicable statutes see *R. R. S. 1943,* sec. 74-815 and sec. 75-501.

Prohibition became a part of Nebraska law in 1916 by the adoption of an amendment to the state constitution. Manufacture and sale of liquor was prohibited "except for medicinal, scientific or mechanical, or sacramental purposes." The legislature provided that wine for sacramental purposes might be sold "to bona fide religious organizations or churches qualified to purchase the same." The sale of such wine was restricted to wholesale druggists who possessed a stock valued at $25,000 and who paid a special federal tax. In 1923 the attorney general expressed doubt that any druggists in Nebraska were qualified to sell wine for sacramental purposes.[23]

The prohibition provision of the Nebraska constitution was repealed in 1934 and in 1935 the Nebraska liquor control act governing the sale and use of liquors was put into the statute books. It specifically provided for "the possession and dispensation of wine by an authorized representative of any church for the purpose of conducting any bona fide rite or religious ceremony conducted by such church." None of the provisions of the lengthy act, it was stated, were to "apply to wine intended for use and used by any church or religious organization for sacramental purposes."

Marriage, which until recently in Christian countries was largely a religious ceremony, is in law considered a civil contract to be regulated by the state.[24] Although until 1923 common-law marriages were recognized in Nebraska, since then a license, procured from a county official prior to marriage, has been required. Since 1943 a pre-marital blood test has also been required.

While marriage is a civil contract in law, the relationship of religion to marriage has been recognized in Nebraska. The first territorial legislature provided that "every licensed or ordained preacher of the gospel" was given the power to perform the marriage ceremony. No particular form of ceremony was necessary, although two witnesses besides the official were required. The law specifically provided that "it shall be lawful for every religious society to join together in marriage such persons as are of the said society, according to the rites and customs of such society, to which they belong." A certificate was to be sent by the religious official in charge to a county official who was required to maintain a proper record.[25]

[23] *Rep. Att'y Gen. 1924,* 460.

[24] *R. R. S. 1943,* sec. 42-101. It was so defined as early as 1856. See *Terr. Laws 1856,* 150.

[25] *Terr. Laws 1855,* (1st Sess.), 209-211.

In 1866 these territorial provisions were incorporated into the law of the new state. A law of 1869 slightly modified the provision as to those who were authorized to perform the wedding ceremonies. It provided that in addition to judges and justices of the peace, "every preacher of the gospel authorized by the usages of the church to which he belongs, to solemnize marriages, may perform the marriage ceremony in this State." This privilege accorded religious societies and their representatives has been substantially retained throughout the history of the state.[26]

Attempts to limit the freedom of clergymen in their performance of the marriage ceremony have been largely unsuccessful. For example, a bill introduced in 1893 aimed at requiring ministers and justices of the peace to procure licenses from the state before performing marriage ceremonies failed to pass. A similar threat to the freedom of clergymen occurred in 1908, when the Nebraska Supreme Court was asked to determine whether the statute which provided that judges, justices of the peace, and preachers "may" perform marriages, was permissive or mandatory. The court decided that in the case of justices of the peace, the law provided a fee and therefore it might be considered obligatory to perform the ceremony. With judges and clergymen it was a different matter. The ordinary duties of judges might be interfered with if they were compelled to perform such ceremonies. As far as clergymen were concerned, the court pointed out that "the usages of some church denominations forbid the solemnization of certain marriages which the law regards as valid." Such marriages, the court felt, clergymen should not be required to perform.[27]

It would seem, then, that Nebraska law has consistently permitted religious societies considerable freedom in providing for the marriage of their members. Moreover, the highest court of the state has protected the freedom of the religious societies by upholding their right to determine those whom they will marry.

Several statutes have been passed in Nebraska prohibiting blasphemy and the use of profane language. Neither in Nebraska nor in other states do such laws constitute a denial of religious liberty. They are based upon the assumption that no one is free to outrage the moral and religious convictions of a community. Blasphemy might outrage the sentiments of Christians to such an extent that a breach of the peace would result and it is forbidden on that ground.[28]

[26] For the current statutory provisions see *R. R. S. 1943*, sec. 42-108 and sec. 42-115.
[27] *Douglas County v. Vinsonhaler*, 82 Neb. 810 (1908).
[28] Zollmann, *American Church Law*, 39-40.

Nebraska law since 1866 has included a general prohibition against profanity. The present provision reads as follows:

> Whoever, being of the age of fourteen years and upward, profanely curses or damns, or profanely swears by the name of God, Jesus Christ, or the Holy Ghost, shall be fined in a sum not exceeding one dollar nor less than twenty-five cents for each offense.[29]

In 1908 a case involving this statute came before the Nebraska Supreme Court. A youth of sixteen had used profane language in the presence of "a number of persons, both ladies and gentlemen." He had been sentenced to the State Industrial School at Kearney under a statute providing for commitment of those under eighteen who lacked "proper parental care" and were "growing up in mendicancy or crime."[30] Appeal to the supreme court was made on the basis of several errors. The court dismissed these errors and upheld the conviction by the district court. Justice Reece, who wrote the opinion of the court, was not at all convinced that commitment to the industrial school was punishment. He suggested that the industrial school was no more a prison than a public school where attendance is enforced. Rather, he continued, "it is a place of education, reformation, refinement and culture." In fact, he concluded, sending a boy to the industrial school changes "the prospective punishment into a blessing."[31]

A number of other Nebraska statutes regulate the use of profane and obscene language. For example, the person using "obscene or lascivious language or words in the presence or hearing of any female" is subject to imprisonment and fine. Since 1887 provoking an assault by the use of "a grossly vile and insulting epithet" has been a misdemeanor. The law since 1905 has provided that the habitual use of "vile, obscene, vulgar, profane or indecent language" is a sign of juvenile delinquency. Under a statute passed in 1937 an undertaker's license may be revoked if such undertaker uses "profane, indecent or obscene language in the presence of a dead human body, or within the immediate hearing of the family or relatives of a deceased, whose body has not yet been interred or otherwise disposed of." In addition to

[29] *R. R. S. 1943*, sec. 28-936.

[30] *The Compiled Statutes of the State of Nebraska 1881* (Lincoln, 1907), sec. 4840. In order that the compiled statutes might be kept current, fifteen editions of this compilation were issued between 1884 and 1911. This source will henceforth be cited as *C. S. 1881* followed by the date of the particular edition cited.

[31] *Roberts v. State*, 82 Neb. 651, 656-657 (1908).

providing laws for the direct control of the use of profane and obscene language, the state has delegated further powers of control to its subdivisions. The governing bodies of cities have long been given specific authority to establish ordinances controlling the use of obscene and profane language.[32]

While sometimes persons are arrested and charged with breaking the laws and ordinances prohibiting profanity, it is common knowledge that they are not rigidly enforced. They still remain, however, as more or less mute witnesses to the fact that the state protects the religious convictions of its citizens.

When the new capital city, Lincoln, was surveyed, the commissioners responsible for locating the city permitted representatives of various religious denominations to select three lots as sites for their churches.[33] The legislature in 1869 approved this action and authorized the governor "to give a deed, in the same form as those given to actual purchasers," to the trustees of the churches as soon as a church building was erected, provided such building was erected within two years.[34] In the next few years, as other churches were established, special laws were passed authorizing the governor to deed additional lots for the erection of church buildings. By 1875 some 38 lots in Lincoln had been deeded to churches in this fashion.

In 1885, apparently as the result of the rapid increase in churches and the equally rapid decrease in available city lots, the state revised its policy. In that year a price was charged for lots acquired by churches. Two years later, although several requests were made by churches for a donation of land, the legislature refused to grant further requests. This has been the subsequent practice of the legislature, although in 1895 it was provided that the German Evangelical Lutheran congregation, which had paid the state $500 for its lots, was "entitled to the same consideration" shown other religious denominations and its money was refunded.[35]

Various privileges related to property holding have been accorded by Nebraska law and courts to religious societies. For example, in 1914 the supreme court of the state held that a mechanics lien could not be enforced against Tabitha Home, a charitable enterprise supported by

[32] For such grants of power see *R. R. S. 1943,* sec. 14-102, sec. 15-256 and sec. 16-228.

[33] See "Report of Commissioners to Locate the Seat of Government of the State of Nebraska" as cited in *S. J. 1869,* 303-304.

[34] *Laws 1869,* 276.

[35] *Laws 1895,* c. 101 and *Laws 1901,* c. 110.

a religious society. The court agreed that the corporation formed for the holding of the title of Tabitha Home was not a religious society. Thus, said the court, "if we look to the form of the matter only, this was not the property of a religious society; if we look to the substance, however, it was the property of such society." Since, according to Nebraska law, property of religious societies could be encumbered only with the approval of the district court and such approval had not been given in this case, the court held that no lien had been created. The court realized that the decision was in conflict with some authorities but felt that to allow the lien and order foreclosure "would divert the property from the charitable purposes" to which it was dedicated "and would completely destroy its object."[36]

As early as 1873 the legislature was concerned with the difficulty some societies were having in securing proper church sites in sparsely settled portions of the state. A joint resolution was passed requesting that Congress amend the Homestead Law so that a homesteader might voluntarily relinquish land, not to exceed five acres, for use of schools, churches, or cemeteries.[37] A decade later, the law providing for the sale of school lands made provision for purchase of up to ten acres of land by churches or cemetery associations "for church or cemetery purposes." The law on this matter has been amended a number of times but provision is still made for the purchase of school lands by cemetery associations.[38] The method of purchase of school land occupied by churches or cemeteries by the church or cemetery so occupying it, has been outlined in the law since 1885.[39] Provision has also been made in Nebraska law since 1915 for the acquisition of land needed for enlarging cemetery facilities. Churches and parishes, as well as cemetery associations, villages and cities, may initiate condemnation proceedings if the land cannot be purchased in any other manner.[40]

Various other privileges have also been accorded to religious societies. The exemption from taxation of property held by religious societies is of particular importance. Also of considerable importance is the enforcement of ecclesiastical law by the secular courts and the protection of the Sabbath from desecration.

[36] *Horton v. Tabitha Home,* 95 Neb. 491, 503-504 (1914).
[37] *Laws 1873,* 97.
[38] *R. R. S. 1943,* sec. 72-220.
[39] *Ibid.,* sec. 72-227.
[40] *R. R. S. 1943,* sec. 12-201 and *R. S .C. S. 1953,* sec. 12-205.

It would seem reasonable to conclude from the foregoing survey that various privileges have been accorded religious groups and their representatives by the State of Nebraska. At the same time, it should be recognized that these are privileges, not rights. As privileges they may be granted or withheld as the state wishes. Moreover, care has been taken to ensure that when such privileges are granted, they are granted generally and that no particular sectarian group is an object of special favor.

4 / *Religious Corporations and Administrative Decisions*

THE State of Nebraska at times has exercised certain controls over religious societies. Such controls have often been related to the holding of property and the amicable settlement of disputes in which religious organizations have been involved.

Separation of church and state would seem to require not only that the church limit its influence on the state, but that the state be not unduly zealous in exercising its influence over the church. It is obvious that problems concerning both the relationship of church and state and religious freedom are involved in the amount of supervision and regulation exercised by the state over the church.

Any discussion of the control exercised by the state over the property-holding activities of religious organizations necessarily involves a discussion of religious corporations and of civil administrative decisions which concern religious societies.

The Nebraska statutes providing for the incorporation of religious organizations have not been entirely uniform in the use of terminology. The earliest Nebraska legislation referred to "any church, congregation or religious society."[1] The act of 1883, which spelled out one method of incorporation procedure in detail, used the terms "churches, parishes and societies of all religious bodies, sects, and denominations."[2] The statute of 1949 used the terms "church, parish, congregation, or association."[3] Various standard legal reference works

[1] *Terr. Laws 1856,* 176-177.
[2] *Laws 1883,* c. 17.
[3] *Laws 1949,* c. 31.

prefer to use "religious societies." The Nebraska Supreme Court and the Nebraska legislature have tried to clarify the meaning of the various terms which have been applied to religious organizations. Such terms as "parish," "congregation," and "association" have not been the subject of judicial or legislative definition, but it seems reasonable to assume that they have been used by the legislature to mean substantially the same as "church," "church society," or "religious society."

Religious societies are considered voluntary organizations in Nebraska. In 1890 the highest court of the state defined a "church society" as

> a voluntary organization formed for the advancement of the spiritual welfare of its members by counsel, admonition, and example, and to enable the society to employ and pay a pastor to look after, not only the welfare of that particular organization, but many charitable objects requiring aid, and to promote, as far as possible with the means at hand, the welfare of the race.[4]

Five years later the same court approvingly quoted the United States Supreme Court to the effect that the right to form voluntary religious associations to express and disseminate any religious doctrine and to create tribunals to decide questions of faith and matters of ecclesiastical government is unquestioned.[5]

A "church," according to the Nebraska Supreme Court, is a sectarian group organized for religious purposes. In 1913 the Nebraska court quoted Webster to the effect that a "church" was "a body of Christian believers holding the same creed, observing the same rites, and acknowledging the same ecclesiastical authority." The term, it said, "imports an organization for religious purposes." It was further stated that the terms "church" and "society" were "used to express the same thing, namely, a religious body organized to sustain public worship."[6]

In Nebraska a church may hold property. Such property holding is not necessary, however, for the Nebraska Supreme Court has held that "a religious society can exist without having either a church building or a parsonage." In fact, the court observed that "many religious

[4] *Jones v. State,* 28 Neb. 495, 499 (1890).

[5] *Watson v. Jones,* 80 U. S. 679 (1871) as quoted in *Pounder v. Ashe* (rehearing), 44 Neb. 672, 680-681 (1895).

[6] *In re Estate of Douglass,* 94 Neb. 280 (1913).

societies in Nebraska have no tangible property, but they exist, maintain their organizations, serve their members and their communities, and are distinct forces for good in our citizenship."[7]

While Nebraska law provides for the incorporation of religious societies, such incorporation is not necessary. The legislature, in 1915, when it regulated the succession of property of dissolved religious societies, defined such religious societies to include "all bodies or associations organized for sectarian or religious purposes, whether the same have incorporated under the laws of this state or not." Likewise, an act of 1949 classified what it called "religious associations" into four groups including unincorporated organizations.[8] It should be noted here that religious corporations differ from charitable and educational corporations. The fact that a corporation is under control of a particular church does not necessarily make it a religious corporation. The line is not distinct, but the primary concern in this study is the religious corporation.

In Nebraska religious societies are voluntary organizations which have the right to spread their beliefs and decide their own matters of faith. They are sectarian and are organized for religious purposes; they may or may not hold property; and they may be either incorporated or unincorporated.

Early religious societies in the United States were not incorporated. This was partly due to the simplicity of legal procedures and partly to the feeling that legal recognition of religious societies was associated with the union of church and state. Over a century ago, however, in order to enable religious societies to enjoy the privileges of legal entities and to limit financial liability of individual members, American legislatures began to pass special acts granting charters to religious societies. The practice of granting special charters was open to abuse, and public reaction resulted generally in constitutional prohibition of it. Provision was then made for general incorporation laws for religious societies. At present all states provide for the incorporation of religious societies except Virginia and West Virginia, where such incorporation is prohibited by constitutional provision.

The Nebraska practice followed that of the other states. During the territorial period special laws were used for many purposes including that of incorporation. The first state constitution, however, provided that "the legislature shall pass no special act conferring corporate

[7] *In re Application of Tyler,* 135 Neb. 667, 678 (1939).
[8] *Laws 1949,* c. 31, sec. 1. For the current statute see *R. R. S. 1943,* sec. 21-834.

powers." This prohibition has remained in the subsequent constitutions of Nebraska.

Before the adoption of the first constitution, the Nebraska territorial legislature had already passed a general statute under which religious societies might become incorporated.[9] This law really provided two modes of incorporation. It described means by which the members of a church might gather to elect "discreet persons of their church . . . not less than three in number as trustees." These trustees were to take charge of the property which might be acquired by the group "either for a meeting house, burying ground, or for the residence of a preacher." This method of organization would suffice for most Protestant groups. Possibly with the Roman Catholic Church in mind, a further provision stipulated that when the rules and usages of a denomination required that the trustees be appointed by a particular official, certificates of appointment were to be recorded in the "register's office of the county." With such filing the trustees and their successors became a body corporate "with all rights, powers and privileges of *other religious corporations constituted according to the provisions of this act.*" The statute was rather loosely written and did not specifically provide for the filing of articles of incorporation by the congregational groups nor did it specify that they were to be corporations except by implication in the italicized section cited above. In an effort to remedy this oversight, the powers of the trustees were spelled out more completely the following year. The officials of the Protestant Episcopal Church were apparently not satisfied with the general incorporation law. As a result, in 1862 an act was passed describing in detail the mode of incorporation for Protestant Episcopal churches.[10] These early territorial laws foreshadowed the history of the incorporation of religious societies in Nebraska.

In 1864 the territorial legislature enacted a new general incorporation law "to Create and Regulate Incorporations in the Territory of Nebraska."[11] Provisions for the incorporation of "Religious and Other Societies" were set out in five sections. The act specifically provided that "all acts and parts of acts" inconsistent with it were repealed. The provisions for incorporating religious societies called for a meeting of the majority of the members of an organized church, the election of trustees, and the filing of a record with the county clerk. Once this was done it was provided that the "associated members and their suc-

[9] *Terr. Laws 1856,* 176. Italics in section cited below supplied by the author.
[10] *Terr. Laws 1861,* 57-61.
[11] *Terr. Laws 1864,* 93.

cessors, shall be invested with the powers, privileges and immunities incident to aggregate corporations." The powers specifically conferred on the new corporation included those of contracting, suing or being sued, the acquisition, holding and disposal of property, and the setting up of by-laws. Replacement of defunct trustees was to be taken care of by election at a meeting of the majority of the members of the church.

It is interesting to note that this new statute of 1864 did not include the provision for appointment of trustees by some superior church official as provided in the earlier statute. Neither did it include the special provisions for the Protestant Episcopal Church. It was possible, of course, to infer that such provisions were among those of previous acts which were not "inconsistent" with the new act. This inference, however, was not borne out. In 1866 the new revision of the statutes contained neither of the questionable provisions but cited verbatim the act of 1864.[12] There appears to have been no immediate reaction on the part of the Roman Catholics, but pressure was apparently brought upon the last session of the territorial legislature by the officials of the Protestant Episcopal Church for clarification of this matter. In any case, a statute passed February 10, 1867, stated that whereas doubts had arisen as to whether the act providing for incorporation of the Protestant Episcopal Church had been repealed, it was "revived and continued in force."[13] Regardless of this revival of the act in question, it appeared in neither the statutory compilation of 1873 nor that of 1881.[14] A law of 1885 referred to churches incorporated under the original act of 1862 and provided for incorporation of a cathedral. Otherwise, no reference was found to the act in the Nebraska statutes until 1911, when a new act, quite similar to the earlier territorial law, was passed, providing in detail for the incorporation of Protestant Episcopal Churches. This law has remained substantially unchanged.[15]

One scholar of American church law[16] has pointed out that there now exist in the United States essentially three types of religious corporations: the aggregate or membership corporation; the trusteeship corporation; and the modified corporation sole. These different types

[12] *R. S. 1866,* 204-205. This revision purported to contain all statutes of the territory in force.

[13] *Terr. Laws 1867,* 15.

[14] *G. S. 1873* claimed to include "all laws of a general nature in force, September 1, 1873" while *C. S. 1881* claimed to include the same as of July 1, 1881. It may be that this particular statute was considered a special law.

[15] For the statute as of 1954 see *R. R. S. 1943,* secs. 21-816 to 21-830.

[16] Zollmann, *American Church Law,* 129.

of corporations serve different types of church organizations. The aggregate type, in which the members of the church form the corporation, is best adapted to the congregational form of church government. The trusteeship type, in which a group of trustees form the corporation, is best adapted to the representative type of church government. The modified corporation sole, in which the bishops and higher ecclesiastics constitute and control the corporation, is characteristic of hierarchical church government.

With the decade of the 1880s the Roman Catholic population in Nebraska increased rapidly. One of the adjustments to the changing religious complexion of the state was legislation providing incorporation procedures more amenable to hierarchical church organization. The Second Plenary Council of Baltimore in 1870 had urged members of the hierarchy to see that the civil law was revised so that "the impediments to the liberty of the Church and to the security of ecclesiastical property be removed or diminished." A statute of 1881[17] amended the earlier statutes with this in mind, but in 1883 a comprehensive incorporation statute was passed to serve the hierarchical type of church government. This statute applied to churches with a central governing body with "spiritual jurisdiction" which extended over more than six counties. In order to incorporate a church of this type, the statute provided that the chief executive officer should call a meeting of himself, a subordinate officer having general jurisdiction in the area, and the minister and at least two laymen from the church in question. These five persons, the statute provided, were to adopt articles of incorporation and after they had been recorded by the county clerk these five men were to constitute the corporation. This statute was essentially the same as a New York law of 1863 which was followed in many other states.

While this statute has been amended and revised a number of times in the subsequent history of the state, the basic provisions have remained. In effect, this statute sets up a modified corporation sole. Under it the bishop of a Roman Catholic diocese for all practical purposes controls the corporation. Both the vicar-general of the diocese (the subordinate mentioned in the statute) and the minister of the local church are appointed by and are responsible to the bishop. He also appoints the two original lay members of the corporation. The bishop thus controls at least three of the five votes of the corporation. Although the true corporation sole in which the bishop would control

[17] *Laws 1881*, c. 35.

all of the property of the diocese in his own name does not exist in Nebraska, the effect of the law of 1883 was to establish the control of the bishop over church property.

By 1883, then, the pattern for the incorporation of religious societies in Nebraska had been clearly established. Most Protestant groups, with the possible exception of the Protestant Episcopal Church, would be incorporated under one set of statutes,[18] while Roman Catholic parishes would normally be incorporated under another set.[19]

It was not until 1913 that the various sections providing for the incorporation of religious societies were gathered together into one article.[20] The sections were not integrated until 1949, when the legislature placed religious societies, both incorporated and unincorporated, into four classifications. In 1951 a fifth division was added. Most of the essential provisions of the incorporation laws, however, were not changed by the reclassification. The classification made in 1949 applied to all except the Protestant Episcopal societies for which separate and distinct provisions still remain.

The historical development of the Nebraska incorporation statutes applying to religious societies is similar to that of other states. Certain limitations have been placed upon religious societies by the incorporation statutes, but the state has made a sincere effort to adjust its laws to the needs not only of the Protestants and Catholics in general, but to the peculiar needs of the Protestant Episcopal Church.

The Supreme Court of Nebraska has frequently found it necessary to make decisions relative to religious societies. The problems raised have usually, but not always, been concerned with control over property. Problems involving the acquisition, the holding or use, and the disposal of property by religious societies have come before the court. In making its decisions on these matters, the court has often faced the difficult problem of determining the extent of its jurisdiction over the property and activities of religious societies. The limits the court has set to its jurisdiction are important in determining both the extent of religious freedom and the degree to which legal separation of church and state actually exists in Nebraska.

Various problems have faced the Nebraska court with reference to acquisition of property, particularly real property, by religious so-

[18] *C. S. 1881* (1885), c. 16, secs. 40-44.

[19] *Ibid.*, secs. 167-171. Henceforth in this chapter, the act of 1883 will be referred to as the Catholic incorporation statute.

[20] See *Revised Statutes of the State of Nebraska 1913* (Lincoln, 1914), c. 14, art. VIII. This source will hereafter be cited as *R. S. 1913*.

cieties. These problems fall rather logically into a twofold classification. First, what religious societies may acquire property? Second, how much real property may a religious society acquire?

Religious corporations organized under Nebraska incorporation laws have had their right to acquire property recognized from the beginning.[21] In addition, it has been held that trustees may acquire property for an unincorporated religious society and transfer such property to the religious society after it becomes incorporated.[22]

The Nebraska Supreme Court has been called upon to determine whether religious groups not incorporated in Nebraska may acquire real property in the state. This problem arose as the result of a rather drastic act of 1889 which placed limitations upon the holding of Nebraska real estate by corporations not incorporated in Nebraska. The general tendency of the Nebraska court has been to protect gifts and devises for religious, charitable and educational purposes. The court has held that the willing of property to two different church organizations in Norway to be held in trust to aid servant girls, widows and orphans was a valid trust.[23] A few years later it was held that a gift to promote a religious organization was a donation to public charity.[24] In 1918 the court was again faced with a problem involving this matter. Some real estate had been left as a devise to the Women's Board of Home Missions of the Presbyterian Church in the United States, a foreign corporation. The court decided that this was a charitable trust. Since, it said, "the courts generally, including our own, hold that donations by will for charitable purposes are viewed with favor," the court would create a trustee competent to hold the trust.[25] The following year the legislature provided that no gift to a religious, educational or charitable use in other respects valid, would be invalid merely because of the indefiniteness of the persons designated as beneficiaries. If no trustee were designated in the gift or devise, such trusteeship was to vest in the district court.[26] In 1935 when property was willed to a foreign religious corporation to be used for educational and missionary work, the court followed its precedent and refused to permit a charitable trust to fail because there was no competent trustee. Instead, the court appointed a trustee to administer the trust.[27]

[21] See *Terr. Laws 1856,* 176-177.
[22] *State v. First Catholic Church of Lincoln,* 88 Neb. 2 (1910).
[23] *In re Estate of Nilson,* 81 Neb. 809 (1908).
[24] *In re Estate of Douglass,* 94 Neb. 280 (1913).
[25] *Gould v. Board of Home Missions,* 102 Neb. 526, 531 (1918).
[26] *Laws 1919,* c. 211. See also *R. R. S. 1943,* sec. 30-239 and sec. 30-240.
[27] *Stork v. Evangelical Lutheran Synod,* 129 Neb. 311 (1935).

The Nebraska court has very clearly stated that the Roman Catholic Church is not a corporation and cannot acquire title to property in Nebraska. When, in 1905, the briefs and arguments in a case implied that the Roman Catholic Church might acquire property in Nebraska, Commissioner Ames commented as follows:

> To our minds this is an inconceivable assumption. That church is not, in contemplation of the laws of this state, a corporation, or a partnership, or a legal entity of any sort, and does not claim so to be. It is a hierarchy composed of a series of clerical dignitaries of various ranks and degrees, scattered over the whole world, and deriving their power and importance from the papal court at Rome, to whom they owe allegiance, and from whom they are liable at any time to suffer degradation. That court claims to be an independent sovereign power, a political as well as an ecclesiastical state having universal dominion, superior to all other principalities and powers of whatever description and wherever situated. As such it can acquire territorial rights in Nebraska, if at all, only with the consent of its legislature, by treaty with the government at Washington.[28]

It would appear from past practice that a religious society incorporated in Nebraska may acquire property in the state. In addition, both the legislature and the supreme court have acted to protect the property interests of religious groups not incorporated in Nebraska, whether the religious groups in question are domestic unincorporated groups or foreign corporations. This protection has been provided by appointing competent trustees when such are lacking.

There is no uniformity of practice among the states concerning the amount of real property a religious corporation may acquire. Some states place no limitation upon the amount of property acquired or held by religious societies; others use various yardsticks. In some cases a limit is placed on the money value of property which may be acquired. In other states quantity, without reference to value, is the measure. In still other states, no limitation as to value or quantity is established, but only as to the purposes for which real estate is acquired. This last measurement has been the major yardstick used in Nebraska.

The first Nebraska statute providing for incorporation of religious societies[29] stated that property might be acquired by a religious society "either for a meeting house, burying-ground, or for the residence of a

[28] *Bonacum v. Murphy* (rehearing), 71 Neb. 487, 493 (1905).
[29] *Terr. Laws 1856,* 176-177.

preacher." It was amended in the following year to provide for acquisition of "property of any kind for the purposes of church extension or building, or the support of ministers." An additional clause apparently provided that property could be acquired "for the use and benefit of such religious society."[30] The incorporation law of 1864, which was especially adapted to the practice of Protestant groups and which remained substantially unchanged until 1949, provided that religious corporations might acquire, hold, and dispose of real and personal property "for the purpose of carrying out the intentions of such society or association, but they shall not acquire or hold property for any other purpose."[31] In 1900, on the basis of this last provision, the Nebraska court held that a church corporation might not purchase real estate for speculation as this did not promote the object of its creation.[32]

The Catholic incorporation statute of 1883 carried no direct stipulation as to the amount of property which might be acquired by religious corporations organized under it.

The early statute providing for incorporation of Protestant Episcopal societies used the value measurement to regulate property acquisition. Parishes were limited to personal property valued at $5,000 and real property valued at $50,000.[33] The new act of 1911 limited real property to that "for the sole and exclusive use of such Parish or Church" and for the uses declared in conveyances or grants. Churches organized under the provisions of this statute were permitted to have "such personal property as may be deemed necessary or convenient."[34]

All three acts were accumulated into a single article of the statutes in 1913 but there was no attempt to integrate them. The provisions referring to property acquisition which applied to the Protestant Episcopal Church were not changed. However, the statute provided that "the trustees or directors, who may be appointed under the provisions of this *article*"[35] might acquire and hold real or personal property "for the purpose of carrying out the intentions of such society or association, but they shall not acquire or hold property for any other purpose."[36] This wording would seem to apply the use limitation on prop-

[30] The record is confused. See *Terr. Laws 1857,* (3rd Sess.), 133.
[31] *Terr. Laws 1864,* 101.
[32] *Thompson v. West,* 59 Neb. 677 (1900).
[33] *Terr. Laws 1861,* 59-60.
[34] *Laws 1911,* c. 30, secs. 9 and 10.
[35] Italics supplied by the author.
[36] *R. S. 1913,* sec. 645.

erty to all religious societies, not alone those organized under the Protestant incorporation provisions.

Since 1943 the wording of the statutes has been somewhat confused as to how much property religious societies may acquire. The 1943 revision of the statutes left some doubt as to whether any limitations on the amount of property a religious society might acquire were imposed on groups other than those incorporated under the Protestant statute.[37] No express limitation was placed upon the parishes organized under the Catholic statute and provisions concerning the Protestant Episcopal Church were left unchanged. In 1949, when the statutes concerning religious societies were revised, the trustees of unincorporated religious societies were permitted to acquire and hold property "for the use and benefit of the association." No express limitation of any kind was placed upon the amount of property to be acquired by the various types of religious corporations set out in the law.[38]

It would seem from the foregoing discussion that the Nebraska statutes and courts, in so far as they have placed limitation upon property acquisition by religious societies, have generally limited the amount of such property by the use to which it was to be put. The "use" yardstick is, at best, vague, and in Nebraska its application has not been precisely defined. The statutes since 1949 have apparently placed no explicit limit on the amount of property which a religious corporation may acquire.

Litigation arising out of controversies over the holding or use of property by religious societies has been quite common in Nebraska. These controversies have at times been of more than local importance. Such was the controversy growing out of the schism of the Evangelical Association of America in the last decade of the nineteenth century. Such, also, was the trusteeship controversy which has been one of the continuing problems of the Roman Catholic Church. Out of the necessity of making administrative decisions involving religious societies and their property, the Nebraska Supreme Court has developed several clearly defined rules.

It is a well-established rule in Nebraska that real estate held by a religious society for a particular purpose may not be diverted from that purpose. For example, as early as 1895 the Nebraska Supreme Court enjoined members of a Protestant body from diverting church

[37] See *R. S. 1943*, sec. 21-807.

[38] *Laws 1949*, c. 31. Amendments to the statute in 1951 and 1953 also provided no such limitations.

property from its proper purpose.[39] Likewise, the court held in 1908 that property granted by devise to a religious society for the purpose of conducting a convent school must revert to the grantor or his heirs, as the will provided, when the school was abandoned.[40] Three years later when the use of property of a Roman Catholic parish by an excommunicated priest was in question, the court held that by permitting such use the trustees were not carrying out the intentions of the society under the statute.[41]

The principle that property of a religious society may not be diverted from its purpose has been reaffirmed by the court in a series of recent cases. These cases involved property in Lincoln which had been granted in 1883 by the legislature to a colored congregation for church purposes. In the grant the stipulation was made that should the church abandon the lot for one year, the title would revert to the state. A loan company had a mortgage against the property and foreclosed. The state brought injunction proceedings to prevent the diversion of the property from the use for which it had been granted. The court held that the grant of the property was really a charitable trust and that it might be used only for church purposes by the Mount Zion Baptist Church. It observed, however, that if the loan company chose to take title as a trustee, it might do so, but it could not divert the property from use by the Mount Zion Baptist Church for church purposes.[42] The loan company was not easily satisfied and two cases heard by the court in 1941 involved the property in question. One case, filed against the Mount Zion Baptist Church, aimed at foreclosing on the church building. The court held this was impossible as the building was a part of the realty.[43] The other case aimed at acquiring a writ of mandamus ordering the sheriff to remove the church group from the buildings only. The court refused to issue the mandamus on the grounds that the building was part of the realty, the use of which could not be diverted.[44]

Often the Nebraska Supreme Court has found itself confronted with controversies involving schisms of religious groups. It has then faced the problem of determining where the jurisdiction of the state ends and where the jurisdiction of the church begins. The decisions

[39] *Pounder v. Ashe* (rehearing), 44 Neb. 672 (1895).
[40] *Clarke v. Sisters of Society of the Holy Child Jesus,* 82 Neb. 85 (1908).
[41] *Parish of the Immaculate Conception v. Murphy,* 89 Neb. 524 (1911).
[42] *State, ex rel. Hunter, v. Home Savings and Loan Ass'n,* 137 Neb. 231 (1939).
[43] *Home Savings and Loan Ass'n v. Mount Zion Baptist Church,* 139 Neb. 867 (1941).
[44] *State, ex rel. Home Savings and Loan Ass'n, v. Davis,* 139 Neb. 875 (1941).

of the court on this matter have not been uniform. In fact, it has reversed itself twice[45] in its attempt to define its position in religious controversy. As a way out of its difficulties, however, the court has evolved the rule of civil noninterference.

The extent to which the court would consider ecclesiastical matters came up as early as 1887 when it was asked to determine whether a faction of a Lutheran church could amend its constitution and affiliate with the German Evangelical Synod of North America. The court pointed out that although it would not attempt to enforce the peculiar faith or doctrines of either party, the existence of such faith or doctrines might incidentally be involved in any inquiry relative to the rights of the society. Upon investigation it was discovered that the German Evangelical Synod of North America was a reformed group and the court concluded that there were material differences both in belief and form of government between the Lutheran and reformed groups. The court did not make its decision on the basis of the ecclesiastical differences, however, for it pointed out that the controlling question was: Who constituted the true First Evangelical Church of Nebraska City? In answering this question the court discovered that the faction desiring affiliation with the reformed church had attempted to amend the constitution to permit such affiliation without going through the required procedure as set out in that constitution. The court stated, therefore, that it would adopt the rules of the society "and enforce its polity in the spirit and to the effect for which it was designed." As a result, the faction desiring change had no right to the property of the church.[46]

Less easily solved were problems growing out of the schism in the Evangelical Association of America during the last decade of the nineteenth century. Cases growing out of this schism reached the appellate courts in six states and the Nebraska Supreme Court was called upon three times to render decisions in cases involving it. In the course of its decisions in these cases, Nebraska's highest court accepted the rule of civil noninterference.

The question to be decided in *Pounder v. Ashe,*[47] the first of the cases growing out of the Evangelical schism, was whether or not Ashe, a minister, and his followers had the right to use the property of the

[45] *Pounder v. Ashe,* 36 Neb. 564 (1893), reversed on rehearing, 44 Neb. 672 (1895) and *Bonacum v. Murphy,* 71 Neb. 463 (1904), reversed on rehearing, 71 Neb. 487 (1905).

[46] *Rottman v. Bartling,* 22 Neb. 375 (1887).

[47] 36 Neb. 564 (1893).

Mount Zion Church of the Beaver Crossing Mission of the Evangelical Association of North America. Ashe had been tried by a committee of five elders which had suspended him from his ministerial position. This decision had later been ratified by the annual conference.

Commissioner Ryan wrote the opinion of the court. He recognized that the civil courts should refrain from exercising "judicial functions properly inherent in ecclesiastical authorities." In this case, however, he felt the civil courts had jurisdiction over the controversy because property rights were involved. With this introduction, the opinion examined the Discipline of the Evangelical Association of North America to determine whether or not the committee which had examined and suspended Ashe had jurisdiction. The Discipline provided that a preacher charged with "some crime expressly forbidden in the word of God as an unchristian practice, sufficient to exclude a person from the kingdom of grace and glory" was to be tried by a committee called by the bishop or presiding elder. This committee was given power to suspend the preacher until the next annual conference, at which time the case would be finally decided. Civil courts, the commissioner indicated, knew nothing of the qualification that a crime be "expressly forbidden in the Word of God as an unchristian practice, sufficient to exclude a person from the kingdom of grace and glory." Such courts, however, did have a "generally accepted, clear, legal meaning" for the word "crime." Where individual rights or property rights hinged upon the definition of this word, he insisted, the definition of the civil courts must prevail. After an examination of the meaning of the word "crime" he decided that, as applied to the charges against Ashe, it was "a gross misfit." There was no element of crime, so defined, in the charges against Ashe. Therefore, the committee which had tried and suspended Ashe had no jurisdiction and the civil courts would not exclude him from use of the church property at Beaver Crossing.

It would appear, thus, that while protesting its unwillingness to infringe upon the "judicial functions properly inherent in ecclesiastical authorities," the Nebraska Supreme Court had done just that. While property rights were incidentally an issue, the major point concerned church organization and discipline. Apparently the court soon realized its error and the implications of its decision. In any event, two years later a rehearing was granted at which time the former decision was declared erroneous and overruled.

In an extensive opinion the Nebraska court clarified its position relative to the decisions of ecclesiastical tribunals. Both laymen and clergy, said the court, when they join a church must be assumed to be familiar with the discipline, rules, and regulations which they are ac-

cepting. Thus, Ashe, by joining the Evangelical Church as a minister, had agreed to be subject to its tribunal and its powers and jurisdiction. Moreover, stated the opinion,

> in so far as it affects him alone and his rights to exercise his office as minister and as a member of the association, the civil courts cannot and will not examine the proceedings of the trial committee provided by the discipline, to ascertain whether it has in all things acted in accordance with the rules of the church, or construe the disciplinary laws of the association and take upon them the work of a review or retrial of the case and render in it such verdict or judgment as from the court's construction of the laws of the church, should be announced.[48]

The implications of interference by the civil courts in church matters were clearly recognized by the court. As long as there was no infringement on the rights of a citizen or on the powers and jurisdiction of the state, the church should be free to control and discipline its members, ministers and officers. This is the accepted practice in America because

> it has been almost, if not quite universally, and is now thought to be, the best policy, and consistent with good government, to let the church and state be completely severed, or as nearly so as may be and can be with due observance of all proper laws.[49]

In the conclusion of its opinion the Nebraska court quoted extensively from *Watson v. Jones*[50] and took its stand squarely on that decision in which the United States Supreme Court had stated explicitly the doctrine of civil noninterference. It had insisted that a broad and sound view of the relations of church and state required that whenever questions of discipline, faith or ecclesiastical rule, custom or law had been decided by the highest church court to which it had been carried, then the civil courts must accept such decisions as final. Any other interpretation would result in the denial of the right to organize voluntary associations and to provide tribunals to decide questions which arise among the members of such associations. The United States Supreme Court felt that if the civil courts were to inquire into purely ecclesiastical matters,

[48] *Pounder v. Ashe* (rehearing), 44 Neb. 672, 678-679 (1895).
[49] *Ibid.*, 679.
[50] 80 U. S. 679 (1871).

> the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become in almost every case the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, . . . and would in effect transfer to the civil courts, where property rights were concerned, the decisions of all ecclesiastical questions.[51]

Later in the same year, another case involving the Evangelical schism appeared before the highest state court. In a brief decision the court refused to determine which of two ministers appointed by different wings of the church should serve a congregation. It cited *Pounder v. Ashe* to the effect that this matter was not within the jurisdiction of the civil courts. The dispute, it said, could be solved only by the Evangelical Association of North America. If no regulation existed covering the matter, only the Evangelical Association could supply such a regulation. "The separation of church and state," said the court, "cannot be too thoroughly insisted upon." Moreover, the court stated that a contingency which would justify control of church affairs by the state was "scarcely, if at all, imaginable."[52]

Before the end of the nineteenth century Nebraska's highest court had been called upon twice more to define the extent to which it would interfere in ecclesiastical matters. Both cases involved Lutheran bodies and in each the court reaffirmed its stand in *Pounder v. Ashe.* In the first case an injunction was asked to prevent the turning over of the property of an independent Lutheran church to the Missouri Synod. The claim was made that the Missouri Synod was very strict, insisted that the children of members attend parochial schools, and prevented members from joining secret societies. The court commented that matters of faith were important in the case. In fact, the real question was one of "mere doctrine, into which civil courts are not equipped to inquire." The injunction was therefore denied.[53] In the second case the issue was whether a church organized under the General Synod of the Evangelical Church in the United States could call a minister from the Iowa Synod. The court recognized that the two synods differed in some matters of faith. After reviewing these matters, the court decided that the determination of whether or not the two synods differed

[51] *Ibid.* as quoted in *Pounder v. Ashe* (rehearing), 44 Neb. 672, 681 (1895).
[52] *Powers v. Budy,* 45 Neb. 208, 213 (1895).
[53] *Moseman v. Heitshusen,* 50 Neb. 420 (1897).

in essential particulars on matters of religious teachings, faith and polity should be decided, not by the civil courts, but by ecclesiastical tribunals. If and when such a superior ecclesiastical court determined whether the church in question could choose a pastor from the Iowa Synod "the civil courts will cheerfully take the judgment of the ecclesiastical tribunal as final in the premises and protect the rights of the congregation as declared by such judgment." The opinion ended with a statement to the effect that

> the courts of the state are but the humble instruments for interpreting human laws which know no heresy, and are committed to the support of no dogma. Religious freedom and religious toleration would not long survive if one member of a religious organization feeling himself aggrieved in some matter of religious faith or church polity, could successfully appeal to the secular courts for redress, and have these courts determine that one faction of a religious organization was orthodox, and living and acting in conformity with the organic creed of the church, and another faction was violating and disregarding such organic law.[54]

It would appear that by the end of the nineteenth century the Nebraska court had satisfactorily defined its position with reference to religious controversy by the acceptance of the rule of civil noninterference. As is so often the case, however, the application of a principle is much more difficult than its pronouncement. Such was the case when the Nebraska Supreme Court found it necessary to apply the rule of civil noninterference to the trusteeship controversy.

During the first years of the twentieth century the trusteeship controversy within the Roman Catholic Church resulted in considerable litigation in Nebraska. This controversy dated back to the early days of the republic and was not limited to Nebraska. The controversy grew out of the difficulties of adjusting the Catholic polity to American democratic ideas. Essentially it involved the problem of whether laymen or clergymen should control church property. When laymen controlled the temporalities of the church, as they did under early state laws providing for incorporation, they sometimes interfered with spiritualities. They even went so far as to insist upon choosing their own priests without reference to the bishop. Such practices were intolerable within the polity of the Roman Catholic Church.

No less than six times in the first eleven years of the present century the Nebraska Supreme Court was called upon to define its posi-

[54] *Wehmer v. Fokenga,* 57 Neb. 510, 518-519 (1899).

tion on disputed church matters involving the trusteeship controversy. This controversy in Nebraska was complicated by the personal antagonism of two men of Irish extraction, Bishop Thomas Bonacum and Father William Murphy.

Bishop Bonacum removed Father William Murphy from the pastorate of St. Andrew's Church of Tecumseh and appointed another priest. The two lay trustees of the corporation, organized under the incorporation act of 1883, refused to permit a new priest appointed by Bishop Bonacum to occupy the church or rectory. As a result, Bishop Bonacum brought suit to enjoin the lay trustees of St. Andrew's Church from hindering the new priest in his use of the church and rectory. The lay trustees insisted that the only controversy between the people and the bishop concerned the right of the people to select their lay trustees. Once the Bishop recognized that right, they agreed to comply with any other legitimate request he might make. Upon examination of the facts, the court discovered that the bishop, the vicar-general, and the priest appointed by the bishop were a majority of the five members of the corporation. Therefore, they were responsible for the care and custody of the church property. As a result, the two laymen, a minority of the corporation, were enjoined from further hindrance of the new priest in his use of the church property.[55]

The same year Bishop Bonacum was involved in a controversy with Father Lewis Harrington whom he had removed as priest at Orleans but who had refused to withdraw. In settling this dispute the court followed *Pounder v. Ashe* and refused to review the laws of the church upon which the decision of the bishop had been based. Such a review, it said, "would amount to nothing less than making law for the church." The bishop was the governing authority of the church and it made no difference whether that authority was one man or several. The method of investigation used by the bishop was also of no consequence to the court. It recognized that the methods of investigation used by the Roman Catholic Church might be different from those looked upon with favor in Anglo-Saxon tradition. The court sympathized with Father Harrington, who had been dismissed after secret investigation "for reasons of which the bishop was sole judge." This was his misfortune, however, for he had voluntarily subjected himself to these procedures when he had joined the church. His remedy, the court felt, was either in appeal to the proper ecclesiastical authorities or in severance of his connection with the church. Since title to property was not involved, but only the disciplines, laws, and canons of

[55] *St. Andrew's Church v. Shaughnessy*, 63 Neb. 792 (1902).

the church, the court would enforce the decision of the bishop to remove Father Harrington.[56]

After leaving Tecumseh, Father Murphy had moved to the Mission of Seward. There he occupied the rectory and the two churches located at Seward and Ulysses and refused to let Father John A. Hays, a priest appointed by Bishop Bonacum, perform his duties. The bishop excommunicated Father Murphy and brought action in the courts to have him removed from the church property. Father Murphy had appealed his case to the Sacred Congregation of Propaganda at Rome and on the basis of this appeal the district court enjoined the bishop from commencing any further civil action until the appeal to Rome had been adjudicated.

This situation faced the supreme court in 1904. The bishop claimed that the courts should not interfere with the exercise of his ecclesiastical rights in the government of the diocese. Moreover, he insisted that the removal and excommunication of Murphy were within his power as an ecclesiastical tribunal. The court felt, however, than an appeal had been made to a higher ecclesiastical court. Therefore, the district court had acted within its jurisdiction in prohibiting further civil action until the appeal had been determined. The court pointed out that

> the law is well settled in this state that civil courts will not review or revise the proceedings or judgment of church tribunals, constituted by the organic laws of the church organization, where they involve solely questions of church discipline or infractions of the laws and ordinances enacted by its ruling body for the government of its officers and members.[57]

The court examined two further questions which it considered of paramount importance. The first of these was whether the presiding judge of the curia which had determined Murphy's case was qualified to try this particular case. The judge in question was, of course, Bishop Bonacum. After some discussion the court determined that Bishop Bonacum was an interested party and was embittered against Father Murphy. The court then applied a procedural rule of the civil courts to ecclesiastical courts and decided that the bishop was not competent to act. Justification for this decision was the claim that inquiry as to whether an ecclesiastical court was organized in conformity with the

[56] *Bonacum v. Harrington,* 65 Neb. 831 (1902).
[57] *Bonacum v. Murphy,* 71 Neb. 463, 470-471 (1904).

constitution of the church was not an ecclesiastical matter. In fact, the court approvingly quoted another court to the effect that

> the assertion of jurisdiction in such a case is not an interference with the control of the society over its own members; but, on the contrary, it assumes that the constitution was intended to be mutually binding upon all, and it protects the society in fact by recalling it to a recognition of its own organic law.[58]

The second question decided by the court concerned the appeal made by Father Murphy to Rome. It was decided that a personal letter to Bishop Bonacum indicating rejection of the appeal could not be accepted. The court, therefore, denied the bishop any relief on the grounds that it would not enforce a decree of a disqualified judge and that an answer had not yet been received from the appeal to Rome.[59]

The year following this rather doubtful decision, a rehearing was granted. This time the court reached an opposite conclusion. It stated explicitly that title to property was not at issue. Only the ecclesiastical or spiritual status of Murphy was involved. The sole issue was whether Murphy was "Catholic or recusant." Reference was made to the injunction imposed on the bishop in the previous hearing prohibiting any further civil action until the appeal to Rome had been adjudicated. The court now envisaged two possible consequences of such an injunction: (1) the civil courts would review the decision from Rome when and if it were returned, which authorities said they could not do; (2) the courts would "humbly and unhesitatingly" enforce this decree of an independent alien power. For the latter, the court insisted, there was no precedent in English-speaking countries. The court was unwilling to admit either consequence and therefore held the injunction void. It also refused to examine the proceedings of the bishop's court for the purpose of deciding whether they were regular or irregular because "it was enough to know that the sentence was pronounced by a body to whom authority was committed by the society for pronouncing a like sentence in any case."[60] Since there was no clarification as to who held the title to the churches in question, the cause was remanded "without prejudice to the future litigation of the rights of either party, if either has any, under the laws of this state, to the property in dispute."[61]

[58] *Smith v. Pedigo,* 145 Ind. 361, 407 (1893) as quoted in *Bonacum v. Murphy,* 71 Neb. 463, 478 (1904).

[59] *Bonacum v. Murphy,* 71 Neb. 463, 486 (1904).

[60] *Bonacum v. Murphy* (rehearing), 71 Neb. 487, 492 (1905).

[61] *Ibid.,* 494.

Father Murphy continued to serve both the churches at Seward and Ulysses apparently with overwhelming support from the congregations. The very heart of the hierarchical control of the church was challenged, for here an excommunicated priest continued to serve two parishes in direct defiance of the bishop.

The bishop again turned to the civil courts for aid in solving his problem. He first brought suit in the name of St. Vincent's Parish of Seward against Father Murphy to restrain him from preventing Father Francis A. O'Brien, the regularly appointed priest, from performing his duties. The request was granted by the district court and Father Murphy appealed to the supreme court. He claimed that the district court had no jurisdiction; that the decision of the trustees to bring the suit was illegally made; and that since his appeal to Rome was still pending, he was entitled to officiate as rector of St. Vincent's Parish. Justice Barnes, who wrote the opinion, considered each of Father Murphy's claims in turn. The district court, he said, had jurisdiction because the civil courts recognize judgments of ecclesiastical tribunals having jurisdiction in matters concerning exclusion from membership. Such jurisdiction had been taken in the earlier case of *Jones v. State* where the court had held that if a religious society had no rules providing procedure for expelling members, then the common law rules would prevail. The trustees had legally brought suit, it was decided, because four members of the five-member corporation were present at the meeting at which the decision was made. Only the one lay trustee who supported Father Murphy was absent. Father Murphy's claim to the retention of his parish until his appeal to Rome was adjudicated was brusquely dismissed by the court with the comment that evidence showed the appeal had been "wholly disregarded, rejected, and dismissed."[62] On these grounds the exclusion of Murphy from the use of the property of St. Vincent's Parish was affirmed.

Although Father Murphy was thus excluded from St. Vincent's Parish, he continued to serve as pastor in the Parish of the Immaculate Conception at Ulysses. Here he had a very strong following. In fact, when Bishop Bonacum visited the village on June 18, 1909, he was driven out by an angry mob of some 250 people who were sympathizers of Father Murphy.[63] The situation at Ulysses was somewhat different from that at Seward. While St. Vincent's Parish had been incorporated under the Catholic incorporation statute, the Immaculate Conception

[62] *St. Vincent's Parish v. Murphy*, 83 Neb. 630, 634 (1909).

[63] Addison E. Sheldon (ed.) *The Nebraska Blue Book and Historical Register 1915* (Lincoln, 1915), 140. This source will hereafter be cited as *Nebraska Blue Book 1915*.

Parish had been incorporated under the Protestant statute. Therefore, after his exclusion from St. Vincent's, Murphy had the Parish of the Immaculate Conception amend its articles of incorporation at a meeting duly announced and attended by most members of the congregation. The amendment provided for nine trustees, all elected by the parish, with no *ex officio* trustees. After the amendment the parish elected seven laymen, the bishop, and the vicar-general as trustees. This action was a direct challenge to clerical control of church property. One of the results of the lay control of church property most feared by the hierarchy was that such control would result in interference with spiritualities, especially in the appointment and control of the clergy. This fear was amply realized at Ulysses.

Bishop Bonacum again turned to the civil courts requesting that Father Murphy be restrained from serving as priest and occupying the church at Ulysses. Before the court Father Murphy insisted, as he had previously, that the bishop had no authority to excommunicate him. Moreover, he insisted, regardless of how great the bishop's authority was in spiritual matters, it did not extend to material things. Therefore, he insisted, a congregation "acting through its trustees, may employ whomsoever they choose to minister to their spiritual wants."

Faced with the above facts and with the claims of Father Murphy, the Nebraska Supreme Court turned to a discussion of religious freedom. It pointed out that American courts refused to coerce anyone "to worship according to any faith or creed or to worship at all." It was careful to emphasize, however, that the courts would protect property rights even if by such protection they interfered with the religious convictions of individuals or groups of individuals. The court continued by explaining that the state constitution implied that the civil courts might be called upon to protect religious denominations in the peaceable enjoyment of their form of worship. The bill of rights guaranteed all the right to worship as they pleased. The constitution also provided that no one should be compelled to attend, erect, or support any place of worship against his consent.

The court then turned wearily to an examination of the situation at Ulysses. The Immaculate Conception Parish had organized under the Protestant incorporation statute. However, it had not reserved the right to acquire, hold, and enjoy property free from the discipline of its parent church. Rather, it had organized in subserviency thereto. In view of the fact that the rules of the Roman Catholic Church prohibit an excommunicated priest from serving as a priest, when he insists upon doing so in buildings

> dedicated to the worship of the faith he assumes to thereby represent, he perverts the trust which the law impresses upon property held for or dedicated to that worship, and the courts . . . will prevent that perversion . . . .
>
> The trustees cannot authorize the diversion of the temporalities of the church from the purposes to which they were devoted by the founders.[64]

The court did not determine whether the amendment to the articles of incorporation providing for nine trustees was valid although Chief Justice Reese dissented stating that the legal trustees should be determined. The Court merely insisted that whoever the trustees were, they had no right to divert the property from its purpose. That purpose was the worship of God according to the faith, canons and discipline of the Roman Catholic Church. The court closed its opinion with the comment that if the people of the parish preferred Father Murphy to Father O'Brien, they had the absolute right to worship under their chosen leader. They could absent themselves from the Immaculate Conception Parish and refuse to support Father O'Brien and the civil courts would protect them in their right to do so. The trusteeship controversy did not appear before Nebraska's highest court again. That it did not may have been partly due to the disappearance from the scene of the principal contenders. Early in 1911, the year that the court handed down the decision in the *Parish of the Immaculate Conception v. Murphy,* Bishop Bonacum died. Later the same year Father Murphy was killed in an automobile accident.[65]

The Nebraska controversy was more than one of personalities, as might be inferred from a bill introduced into the Nebraska legislature in 1919 which would have amended the Catholic incorporation statute by providing four lay trustees instead of two. This would have given lay trustees a majority in the corporation.

A schism in the Evangelical Association and the trusteeship controversy in the Roman Catholic Church thus forced the Nebraska Supreme Court to define its position relative to the controversies of religious societies. Its point of view has remained unchanged, and twenty years after the end of the legal battle between Bishop Bonacum and Father Murphy the court restated its position as follows:

> The rule is that the only grounds upon which civil courts interfere with ecclesiastical cases are for the protection of civil or property rights. The courts will not review the judgment or acts

[64] *Parish of the Immaculate Conception v. Murphy,* 89 Neb. 524, 530 (1911).
[65] *Nebraska Blue Book 1915,* 145-146.

> of a religious organization with reference to its internal affairs for the purpose of ascertaining their regularity or accordance with the discipline or usages of such organization. This rule is supported by the overwhelming weight of authority.[66]

Although the rule would seem to be quite clear, difficulties in application might well arise in the future.

The Nebraska Supreme Court, then, has accepted the rules that property of religious societies may not be diverted and that the courts will interfere in religious controversies only when civil or property rights are involved. In addition, it has held consistently that churches organized on a congregational basis will be protected in their right to control and use their property. In protecting this right, however, the court has at times become involved in complicated controversies.

One such controversy was that between the Kenesaw Freewill Baptist Church and the Nebraska Yearly Meeting. The Kenesaw church had been organized as an independent body. Its constitution provided for control of its property by its local trustees, but the property had been deeded to the Nebraska Yearly Meeting in trust for the Freewill Baptist Church of Kenesaw. When a national merger of Baptist bodies took place, the Kenesaw church approved the union while the Nebraska Yearly Meeting disapproved and organized a new general conference. This latter group refused to recognize delegates from the Kenesaw church, claiming that it was no longer in the denomination. Moreover, it refused to deed the property of the Kenesaw church back to that church. Rather, it insisted that it was holding the property for another congregation conforming to the views of the Nebraska Yearly Meeting.

Using the above facts, the supreme court was asked to determine whether the members of the Kenesaw church, as an independent body, could control the use and title of the church property. The court pointed out that a trust had been created for the Freewill Baptist Church of Kenesaw. It commented that individuals might dedicate their property to further a particular religious doctrine and such property could not be diverted from that purpose. There had been no such diversion by the Kenesaw church. Rather, this was an independent organization, governed by itself. The court felt that those who give to such an organization merely for church purposes expect that church to be "a living organism, subject to change and growth." Such a contributor would not complain, the court insisted, even if there were changes in doctrine or method as long as the original purpose was

[66] *Deloisted v. Hilson,* 120 Neb. 788, 789 (1931).

not abandoned. Hence, the argument made by the Nebraska Yearly Meeting that the new union to which the Kenesaw church had subscribed differed from it in interpretations of freedom of the will, general atonement, open communion, and perseverence of the saints was not of importance. Rather, said the court,

> the general rule appears to be that, when a majority section of the church, independent in government, voluntarily followed the action of the general conference, which resulted in severing its connection with the yearly meeting, it did not thereby lose its identity, and is entitled to control the temporalities of the church, such change not involving any diversion of the property from the original trust.[67]

The right to the control of its property by an independent congregation was confirmed in two subsequent cases. If the church council and a majority of the membership of an independent church have relieved a pastor of his duties, the Nebraska courts will enjoin him from any longer officiating and from occupying the parsonage.[68] Likewise, an independent congregational church society will be protected in possession of its property even though its articles of incorporation provide that in case of division of the congregation or a dissolution of the corporation its property is to be disposed of as some other affiliated organization may direct.[69] After certain members had been expelled according to the by-laws of the German Evangelical St. John's Church, they appealed to the Nebraska District synodical court of the Evangelical Synod of North America for possession of the church property. The church court favored the expelled group. An appeal was taken to the civil courts to enforce the decision of the church court. The supreme court examined the articles of incorporation of the church and discovered the provision that upon division of the congregation or dissolution of the corporation, the property was to be disposed of in accordance with the instructions of the Evangelical Synod of North America. The court pointed out that the matter had never been referred to the synod but only to one of its subdivisions. Moreover, the division envisaged by the articles of incorporation was an "amicable" one. Certainly, the court commented, such provision did not mean that the corporation had abdicated its right to expel members by a two-

[67] *Kenesaw Free Baptist Church v. Lattimer,* 103 Neb. 755, 760 (1919).

[68] *St. Paul English Lutheran Church v. Stein,* 115 Neb. 114 (1926).

[69] *Reichert v. Saremba,* 115 Neb. 404 (1927). For the current statute providing for disposal of the property of religious societies which have ceased to exist, see *R. S. C. S. 1953,* sec. 21-843.

thirds vote. Until the expelled members were reinstated as members of the congregation, they had no claim on its property. The court said that its decision was concerned solely with the possession of the property at issue and the jurisdiction of the district synodical court over it. The court was careful to point out that the jurisdiction of the church over the validity of the expulsion of members or other grievances was not a point of issue.[70]

In certain other cases involving the holding or use of property the Nebraska Supreme Court has faced interesting problems to which no specific rules were applicable. One such case involved a Baptist church which had divided as the result of a dispute over the wearing of certain articles of clothing. Since both groups had contributed to the property, the trustees of the Baptist church conveyed an undivided half of that property to the newly organized Brethren church. Both groups seemed to acquiesce in this division and they used the church property on alternate Sundays for three years. The original group then moved to gain control of the property by insisting that the trustees who had deeded the undivided half of the property really had not held title. The court maintained that neither party had seceded, but that they had merely divided the property because they had "so far forgotten the teachings of the Master as to be unable to dwell together in unity." Moreover, both sides had acquiesced in the division for so long a time that it should not be disturbed. The property, therefore, was to be divided so that each group might receive its due portion.[71]

Problems have arisen over acquisition and holding or use of property by religious societies, and over disposal of such property. As early as 1866[72] Nebraska law directed that when any religious society wished to dispose of or encumber any real estate belonging to it, it must procure a court order. The operation of this law was clarified in 1915 when incorporated religious societies were specifically exempted from such procedure.[73]

Another law of 1915 provided that when a religious society which was "in any way under the control or supervision of any supervising body," ceased to exist, all its property should vest in "the highest governing or supervising corporate body of the same denomination, having its original corporate existence" in the state.[74] This statute of 1915 was tested in 1939 when the Congregational Conference of Nebraska

[70] *Reichert v. Saremba,* 115 Neb. 404, 410 (1927).
[71] *Wicks v. Nedrow,* 28 Neb. 386 (1889).
[72] *R. S. 1866,* 210.
[73] *Laws 1915,* c. 16.
[74] *Ibid.,* c. 178.

started proceedings to gain control of the property of the German Congregational Church of Zion located at Butte, Nebraska. After examining the facts, the court held that there were still eight members; so the church was not defunct. In addition, the facts indicated that the Zion congregation was completely independent of the Congregational Conference and therefore not subject to the statute.[75] The statute in question was not entirely satisfactory in its operation and it was amended by the legislature in 1951 and again in 1953.

The court has also held that the property of a religious society could not be disposed of contrary to the provisions of the constitution of that society. The facts before the court showed that a decision had been made by a vote of the congregation of the Evangelical Lutheran Trinity Church of Dalton to join the Missouri Synod. The constitution of the church, however, provided that the property of the organization might not be "craftily alienated" as long as there were three male members holding the name of the congregation and recognizing its government. Since there were still three male members holding to the original church, the court held the transfer of the property to a Missouri Synod congregation illegal.[76]

Several general conclusions might be drawn from the above survey of Nebraska incorporation law and civil administrative decisions affecting religious societies. First, the legislature has provided methods by which differently organized religious societies may become incorporated. Incorporation, while it provides certain advantages for religious societies in the management of their temporal affairs, is entirely voluntary. Second, the Nebraska civil courts have adopted certain rules or principles in dealing with religious controversies. Most important of these rules is the principle of civil noninterference which means that the courts will not interfere in religious controversies unless civil or property rights are involved. Usually the civil courts will enforce the decree of an ecclesiastical tribunal with little regard for the procedure it used in arriving at its decision. This is true, at least, if such decree is concerned with purely ecclesiastical, as differentiated from temporal, matters. The determination of which are ecclesiastical and which temporal matters is, of course, the crux of the matter. In Nebraska the responsibility for drawing the line rests with the civil courts and at times the highest court has had difficulty in differentiating clearly. Finally, it would seem clear that both the Nebraska legislature and the Nebraska Supreme Court, although uncertain at times, have been

[75] *In re Application of Tyler,* 135 Neb. 667 (1939).
[76] *Geiss v. Trinity Lutheran Church Congregation,* 119 Neb. 745 (1930).

quite successful in holding the interference of the state in the affairs of religious societies to a minimum. In so doing they have protected the freedom of religious worship which is too often destroyed by excessive interference by the state in the affairs of the church. Equally, they have quite successfully maintained the historic separation of church and state in Nebraska.

5 / *Sunday Laws*

It is a common practice legally to limit Sunday activities. The existence of Sunday laws and their support by the courts is an excellent example of the protection offered religious groups, especially Christian sects, by the state.

American courts have generally upheld the validity of so-called "Sunday Laws."[1] At first they upheld these laws "as the exercise of a prerogative of free Christian people seeking to preserve public order and to promote the Sabbath as a day of voluntary worship."[2] Gradually, however, the police power has become the basis upon which the Sunday laws rest. The courts have tended, therefore, to see limitation on Sunday activities as contributing to the well-being of the worker both in providing him opportunity for rest and relaxation and opportunity to worship if he so wishes. Such limitation has also been looked upon as protecting from interruption those who wish to worship.

Although the courts have recently turned to the police power for the support of Sunday laws, there is little doubt that the choice of Sunday as a day set apart from secular pursuits was largely controlled by the fact that it is the Christian holy day. It is only reasonable that the state, in establishing a day of rest for the welfare of its citizens, would choose that day which coincided best with the habits of its people. Sunday was such a day.

Limitation of Sunday activity does not limit anyone's religious freedom, it has been held, because no one is compelled by the Sunday laws to observe any form of religious worship. In fact, such laws protect

[1] Zollmann, *American Church Law*, 55.

[2] William G. Torpey, *Judicial Doctrines of Religious Rights in America*, (Chapel Hill, 1948), 52.

religious liberty for those who otherwise might not be permitted to worship.[3]

Since territorial days Nebraska law has limited the Sabbath activities of residents of the state. Early laws prohibited operation of places of business, participation in public amusements,[4] and engagement in labor, "works of necessity and charity excepted,"[5] on Sunday. However, anyone who did not conscientiously believe the observance of Sunday to be a Christian duty, was not to be liable to punishment for "performing any secular work or productive labor" on Sunday if by so doing he disturbed no one else. Certain necessary activities such as loading and unloading of cargoes and passengers by boatmen were excluded from the operation of the statutes.[6] Care was also taken to protect those who desired to keep some day other than Sunday as the Sabbath. Protection for those who wish to observe Saturday, rather than Sunday, as the Sabbath has remained a part of Nebraska Law. Such protection has not been afforded in all states. The activities of the courts were also regulated in the territorial statutes with an eye to protecting the Sabbath.[7] The various laws controlling Sunday activities were included in the 1866 revision of the statutes and some have remained almost unchanged to date.[8]

There has not been complete agreement in Nebraska as to the necessity or desirability of Sunday laws. Victor Vifquain, a native-born Frenchman, introduced an unsuccessful resolution in the constitutional convention of 1871 to the effect that foreign-born citizens should not be denied by law the privilege of enjoying themselves as they pleased after twelve o'clock noon on Sundays. More indicative of the majority opinion of the convention, however, was a resolution adopted a few days later. It read as follows:

> Believing that the Christian religion is the foundation of our civil liberties, that its benign, equalizing and glorious principles have upheld and perpetuated our Republican institutions, and believing that a desecration of the Christian Sabbath by secular pursuits and amusements have [*sic*] a tendency to drag down and destroy the religious influences of the country and carry us back to the dark ages, therefore

[3] Zollmann, *American Church Law*, 56.
[4] *Terr. Laws 1857*, (3rd Sess.), 141.
[5] *Terr. Laws 1858*, 70.
[6] *Ibid.*
[7] *Terr. Laws 1855*, 147 and 192.
[8] For example, compare *Terr. Laws 1855*, (1st Sess.), 192 with *R. R. S. 1943*, sec. 24-316.

> RESOLVED: That it is the sense of this Convention that Statutory provisions to prevent the desecration of the Christian Sabbath are eminently right and proper in this and all other States of our union.[9]

Both the legislature and the highest court of the state have found it necessary to concern themselves repeatedly with problems dealing with Sunday observance. The history of the Sunday laws in Nebraska would indicate a gradual adjustment to changing habits, customs, and types of entertainment. This adjustment has contributed to a gradual relaxation of the enforcement of Sunday laws.

When in 1873 Nebraska adopted a new criminal code based upon that of Ohio, it contained a provision on Sabbath observance which has remained the basic Sunday law in Nebraska. This provision read as follows:

> If any person of the age of fourteen years or upward shall be found on the first day of the week, commonly called Sunday, sporting, rioting, quarrelling, hunting, fishing, or shooting, he or she shall be fined in a sum not exceeding twenty dollars, or be confined in the county jail for a term not exceeding twenty days, or both, at the discretion of the court. And if any person of the age of fourteen years, or upward, shall be found on the first day of the week, commonly called Sunday, at common labor (work of necessity and charity only excepted), he or she shall be fined in any sum not exceeding five dollars, nor less than one dollar: *Provided,* Nothing herein contained in relation to common labor on said first day of the week, commonly called Sunday, shall be construed to extend to those who conscientiously do observe the seventh day of the week as the Sabbath, nor to prevent families emigrating, from traveling, watermen from landing their passengers, superintendents or keepers of toll-bridges or toll-gates from attending and superintending the same, or ferrymen from conveying travelers over the waters, or persons moving their families on such days, or to prevent railway companies from running necessary trains.[10]

This statute, as amended, has been the major Nebraska Sunday law and around it considerable controversy has raged. At times other statutes have been passed providing statewide regulation of Sunday activities. In addition, the legislature has delegated to cities the power to pass ordinances prohibiting desecration of the Sabbath.

The efforts of Nebraska to regulate Sunday activities of its citizens fall generally into three broad classifications. First, certain types of

[9] *Report of the Constitutional Convention of 1871,* I, 135-136.

[10] *G. S. 1873,* 780. Compare this with *R. R. S. 1943,* sec. 28-940, the current statute.

labor and business activities have been prohibited. Second, participation in amusements has been limited. Finally, the Sunday functions of the courts have been circumscribed and certain legal procedures have been regulated with Sunday in mind.

Problems of what constitutes "common labor," what are "necessary and charitable works," and what business activities result in desecration of the Sabbath have been sources of considerable unrest in Nebraska. Railway operation, barbering, and various types of merchandising have all been examined to determine the extent of the application of the statute to them.

While some states have prohibited the running of freight trains on Sunday, since 1873 the Nebraska Sunday statute has provided for the running of "necessary trains." The Nebraska Supreme Court has indicated that the determination of what trains are necessary has been left up to the railway companies. The court gave an interesting interpretation of this matter in 1886.[11] An employee of a railway company was injured on Sunday while working to keep the tracks in repair. The railway company, the court held, could not escape liability for the workman's injuries by claiming that the workman had engaged in common labor on Sunday and was therefore performing an illegal act under the Sunday statute. The railway was liable because it had decided that the running of certain trains on Sunday was necessary and such operation required that the tracks be kept in repair. In 1909 the court gave further support to the railway's freedom to decide what trains should be run on Sunday. It was held that a carrier was not unduly delaying shipment of cattle by unloading them for feed and rest at a division point when continued shipment would have required the operation of trains on Sunday. This case was appealed to the United States Supreme Court which affirmed the Nebraska court.[12] A case with a similar principle involved a contractor who had refused to work his men on Sunday. It was claimed that delay in carrying a sewer past a brick building had caused damage to the building. The court held that refusal to work on Sunday was "perfectly justified." "Sunday," the court said, "is a day of rest" and the necessity which will justify labor on Sunday "must be pressing and immediate."[13] In a more recent case the supreme court has held that telephone service

[11] *Johnson v. Missouri Pacific R. R. Co.*, 18 Neb. 690 (1886).

[12] *Cram v. Chicago, B. & Q. R. Co.*, 84 Neb. 607 (1909) and *Chicago, Burlington and Quincy Railroad Company v. Cram*, 228 U. S. 70 (1913).

[13] *Oleson v. City of Plattsmouth*, 35 Neb. 153 (1892).

is a "work of necessity" and must be provided on Sundays and holidays.[14]

In the first two decades of the present century there was considerable controversy in Nebraska over whether or not Sunday barbering was prohibited as common labor by the Sunday statute. To remove doubt as to the matter, a legislative bill was introduced in 1907 to prohibit barbering on Sunday. The bill did not pass.

In 1908 the supreme court delivered a decision on the matter of Sunday barbering.[15] Jacob Caldwell, an Omaha barber, had operated a barbershop on Sunday in the Paxton Hotel. He was arrested and fined under the state statute prohibiting common labor on Sunday. In his appeal to the supreme court Caldwell claimed that the Nebraska Sunday statute was unconstitutional under both the Fourteenth Amendment of the Federal Constitution and provisions of the state constitution which prohibited special legislation, guaranteed equal rights, and prohibited any person from being "deprived of life, liberty, or property, without due process of law." In answer to Caldwell's charges, the court pointed out that the Fourteenth Amendment of the Federal Constitution "was not intended to interfere with the power of the several states . . . to enact laws to promote the peace, health, morals, education and good order of the people within those commonwealths." As far as the state constitution was concerned, classification in the application of the police power was all right as long as the arrangement was not purely arbitrary. In 1873 when the statute was adopted, the court commented, there was a sensible distinction between those occupations classified as "common labor" and those not so classified. To justify the classification included in the statute, the court pointed out that in 1873 common labor was unskilled and represented unorganized labor, "the poorest paid and hardest worked of all mankind." Since unskilled laborers were "subject to long hours and incessant toil," the court felt there were "the best possible reasons for the legislature coming to the rescue of those who were 'common laborers' " and legally compelling "the master to give to those toilers one day in seven wherein to rest."

The court could find nothing in the Sunday statute repugnant to the other provisions of the state constitution. It dwelt at some length on its failure to find any discrimination between religious sects in the statute. The statute provided, the court pointed out, for observance

[14] *Farmers and Merchants Telephone Co. v. Orleans Community Club,* 116 Neb. 633 (1928).

[15] *In re Caldwell,* 82 Neb. 544 (1908).

of either the first or the seventh day of the week. That a Jew or Adventist was permitted to work on Sunday if he observed Saturday did not "improperly" discriminate against those Mohammedans in Nebraska who preferred to observe Friday. The court felt such Mohammedans had come to the state since 1873 and had come with full knowledge of the Sunday statute. The court took a firm stand and announced that

> any resident whose employment falls within the inhibition of the statute may choose between the first and the seventh day of the week wherein to refrain from labor, and if he observes the mandate of the law on either of those days, whether he be Gentile, Jew, Mohammedan, Pagan or Agnostic, he is safe from prosecution, not because of the religious significance of the day in his eyes, but because he has obeyed the command of the secular law to abstain from labor upon one of the two days named.[16]

The clear statement in the *Caldwell* case, however, did not settle the question of Sunday barbering. In 1911 the attorney general advised the chief deputy commissioner of labor that barbering came within the prohibitions of the Sunday statutes. He felt that the term "common labor" included "the ordinary vocations of life." It was his opinion that if barbers were to be exempted from the provisions of the act, then plumbers, carpenters, mechanics and tradesmen of all kinds might also be excluded.[17]

Those who opposed broadening Sunday activities felt the statute was a bit vague and open to possible further interpretation permitting Sunday barbering. As a result, the passage of a statute clearly prohibiting Sunday barbering became the aim of this group, and legislative bills to that end were introduced in 1913, 1915 and 1917. Success was achieved in 1917 when a statute was enacted specifically defining barbering as common labor, providing that it should "not be construed as being a work of necessity or charity," and prohibiting it on Sunday under pain of fine. An exception was made for barbering services on Sunday in connection with medical treatment.[18] It is interesting to note that this law "contained no exemption to those who chose to observe another day of the week."[19]

The new statute was soon tested before the supreme court. Edward K. Murray was convicted and fined for barbering in Hotel Fontanelle

[16] *Ibid.*, 547-548.
[17] *Rep. Att'y Gen. 1912*, 174-175.
[18] *Laws 1917*, c. 234.
[19] *Stewart Motor Co. v. City of Omaha*, 120 Neb. 776, 778 (1931).

on Sunday, July 29, 1917. Murray based his appeal to the supreme court on the grounds that Sunday barbering of guests was often necessary in order to make them "presentable in appearance and acceptable to the other guests." Moreover, he claimed, the new act was special legislation and therefore prohibited by the state constitution. It was special legislation, Murray felt, because it imposed a more severe penalty upon barbers than was imposed under the general Sunday act. The maximum fine under the general statute was $5.00, while the minimum fine under the new statute was $10.00. The court could see no "necessity" in Sunday barbering. Likewise, it found no special legislation. The law, it felt, applied equally to all members of a certain class. The statute, therefore, was "a reasonable exercise of the police power."[20]

The statute prohibiting Sunday barbering has remained unchanged[21] although an attempt was made in 1941 to turn the whole matter over to local option. Actually, it is well known that barbers in the Lincoln suburb of College View, a Seventh Day Adventist settlement, close on Saturday but are open on Sunday.

The Nebraska courts have been called upon frequently to determine to what extent the selling of general merchandise on Sunday may be permitted in Nebraska. The majority of the decisions on this matter have concerned local ordinances rather than the general Sunday statute.

An opinion delivered by the supreme court in 1889 set the precedent in Nebraska as to what goods might be sold on Sunday.[22] Louis Liberman and his partner, Berkson, operated their store, "The Fair," on "O" Street in Lincoln, on Sunday. The store carried on a general merchandise business. Such items as ladies' and men's furnishings, dry goods, soap, toilet articles, and many others were sold. Liberman was arrested and convicted of breaking a Lincoln ordinance which prohibited keeping business houses open on Sunday. The ordinance in question excepted certain businesses for "necessary purposes." Drugstores and cigar stores were among those excepted. The ordinance also contained the portion of the state Sunday statute specifically excepting those who "conscientiously observe the seventh day of the week as the Sabbath."

Chief Justice Reese, in writing the opinion of the supreme court, carefully considered Liberman's claims. Liberman insisted that the

[20] *State v. Murray,* 104 Neb. 51 (1919).
[21] See *R. R. S. 1943,* sec. 28-938.
[22] *Liberman v. State,* 26 Neb. 464 (1889).

ordinance was unconstitutional because it gave certain classes of individuals privileges and advantages over their competitors. Drugstores and tobacco stores, he insisted, were not required to close and they were his competitors for they sold many of the same items. This claim the chief justice answered by stating that drugstores were permitted to stay open "for necessary purposes" only. This interpretation did not mean that such drugstores might "engage in indiscriminate trade on Sunday" but rather that they might sell only such medicines as were "necessary to relieve the actual necessities of the public on that day." Hence, the ordinance was not discriminatory. Liberman also insisted that he and his partner were Jews and that they conscientiously believed the seventh day of the week was their day of rest. Therefore, it was claimed, they should not be forced to close on Sunday. Chief Justice Reese quickly dismissed this claim by pointing out that the ordinance required "conscientious observance" of Saturday as the Sabbath. Since Liberman's store remained open on Saturdays, he did not observe that day as the Sabbath as required by the statute. The supreme court, therefore, upheld the conviction of Liberman under the Lincoln ordinance.

The decision in the *Liberman* case has remained the precedent. In 1908 the selling of cigars and newspapers was held to fall under the prohibition of the general Sunday statute.[23] As in the case of Sunday barbering, however, the statutory prohibition of "common labor" seemed general enough to permit a more liberal interpretation at some time in the future. As a result, an unsuccessful attempt was made in the same legislative session which outlawed Sunday barbering to specifically prohibit the sale of general merchandise on Sunday.[24]

In 1925 an Omaha Sunday closing ordinance came under the scrutiny of the supreme court. Ben Somberg had been convicted of keeping his grocery store open on Sunday in violation of an Omaha ordinance. The court pointed out that such ordinances were authorized under the police power delegated to the city by the state. Somberg claimed that drugstores and similar establishments which remained open on Sunday were his competitors. In fact, he said, by permitting them to add various articles for sale, the city practically delegated to such dealers its power of determination over what should be sold on Sunday. The court disagreed and insisted that the articles ordinarily sold in a grocery store were so well known that there should be no difficulty in the operation of the law because of doubt on that

[23] *Rhyn v. McDonald,* 82 Neb. 552 (1908).
[24] *H. R.* 313 (1917).

matter. It commented, however, that if these other establishments were selling grocery items on Sunday, they should not be permitted to do so. The opinion concluded with the comment that because a drugstore is open to sell medicine, "it does not thereby acquire the right to sell soaps, perfumes and baseball bats."[25] In the spring of 1953 the court held that an Omaha ordinance requiring grocery stores to close on Sunday applied to drugstores which sold groceries on weekdays.[26]

Thus, while it has been held that local ordinances may prohibit grocery stores from operating on Sunday, the general Sunday statute has not been interpreted by the courts on this matter. The attorney general in 1930 apparently felt that the operation of grocery and general mercantile stores was not included in the definition of "common labor," for he advised the Rev. Mr. E. H. Thomas of Gretna that "there is no state law forbidding stores being open on Sunday. It is a matter for each town to determine for itself."[27]

A new application of an old principle came as the result of the rapid growth of the motor car industry. The city of Omaha passed an ordinance prohibiting the sale or exchange of motor vehicles and the keeping open of a place of business for that purpose on Sunday. In 1931 the validity of this ordinance came before the supreme court. Chief Justice Goss, who wrote the opinion of the court, insisted that the police power delegated to the city of Omaha by the state made legal the passage of all needed ordinances. In support of his contention that the ordinance in question was not unfair discrimination he cited the *Liberman* case,[28] the *Somberg* case,[29] and the *Murray* case.[30] He suggested that "if the question were new, we might feel more inclined to draw the lines a little more closely than they have been drawn." He felt, however, that the court in the past had committed itself to a liberal interpretation of the constitution with reference to similar ordinances and he was unwilling to blaze a new path.[31]

It would appear from the foregoing discussion that limitations on Sunday merchandising in Nebraska are legal as long as they are not discriminatory. Such limitations have come largely from the action of municipalities under the police power delegated by the state.

Various statutes, in addition to those already discussed, have in one way or another recognized Sunday as different from other days and

[25] *State v. Somberg,* 113 Neb. 761 (1925).
[26] *City of Omaha v. Lewis and Smith Drug Co., Inc.,* 156 Neb. 650 (1953).
[27] *Rep. Att'y Gen. 1930,* 203.
[28] 26 Neb. 464 (1889).
[29] 113 Neb. 761 (1925).
[30] 104 Neb. 51 (1919).
[31] *Stewart Motor Co. v. City of Omaha,* 120 Neb. 776 (1931).

have limited business activities on that day. For example, the first criminal code of the state prohibited keeping "any tippling house" open on the Sabbath.[32] Although that provision was dropped in 1873 when a new criminal code was adopted, a statute of 1881 accomplished the same purpose by prohibiting the selling or giving away of any intoxicating drinks on election day or on Sunday.[33] The object of this statute, according to the Nebraska Supreme Court, was to "preserve the purity of the ballot box," and "to preserve from desecration 'the American Sabbath,' an institution to which, perhaps beyond all others, we owe whatever is good of our national character."[34] In 1935 when the state laws were adjusted to the repeal of prohibition, a statute was again passed regulating the sale of liquor on election days and Sundays. As amended in 1941 this statute provided that no alcoholic liquors, including beer, were to be sold between one A. M. and six A. M. on Sunday and that none except beer might be sold for the remainder of the day. Regulation of the sale of beer on Sunday was left up to local authorities.[35]

Certain general business practices have also been regulated with reference to Sunday. For example, the negotiable instruments statute states that when the last day for doing an act required under that statute falls on Sunday, such act may be done "on the next succeeding secular or business day."[36] However, the highest court of the state has held that neither under Nebraska statutes nor under the common law is a contract entered into on Sunday void for that reason.[37] Likewise, bills of sale made on Sunday are legal.[38]

The state has regulated some of its own activities with the Sabbath in mind. It has provided, for example, that its offices will be closed on Sunday.[39] Also, beginning with the act organizing the Nebraska territory in 1854, the governor has always been allowed to exclude Sundays when counting the days permitted for vetoing an act.[40]

While limitations on labor and business activities on Sunday have affected many people, more general interest has been aroused by the application of the Sunday laws to various types of entertainment. Because of limits placed on Sunday entertainment, many people have

[32] *R. S. 1866,* 622.
[33] *Laws 1881,* c. 61, sec. 14.
[34] *State v. Sinnott,* 15 Neb. 472 (1884).
[35] For the current statute see *R. R. S. 1943,* sec. 53-179.
[36] *R. R. S. 1943,* sec. 62-1,194.
[37] *Horacek v. Keebler,* 5 Neb. 355 (1877).
[38] *Fitzgerald v. Andrews,* 15 Neb. 52 (1883).
[39] *R. R. S. 1943,* sec. 81-113.
[40] For the current provision see *Const.,* Art. IV, sec. 15 (1875-1920).

found their desires for relaxation thwarted. With some justification, these people have argued that if, as the supreme court has said,[41] justification for Sunday laws is to be found in the necessity of rest and relaxation for the laborer, and not in the religious significance of the day, then they should not be limited in their entertainment activities. At the same time, "sporting" has seemed to others an especially flagrant desecration of the Sabbath. As might be expected with this diversity of opinion on Sabbath observance, tempers have flared and considerable controversy has resulted. One such controversy which aroused general concern throughout the state for a long period of time involved the playing of baseball on Sunday.

In 1892 the Nebraska Supreme Court was asked to determine whether "sporting," which was prohibited in the general Sunday statute, included the playing of baseball. Tim O'Rourk and several others had played baseball in Lincoln on Sunday before some thirty-five hundred spectators. Chief Justice Maxwell, a man with strong religious convictions, wrote the opinion of the court. He quickly concluded that baseball playing came within the definition of the term "sporting" and was therefore illegal on Sunday.

This case offered an excellent opportunity to the chief justice to present his point of view on the subject of Sabbath observance. This he proceeded to do in what might be described as a lengthy sermon. He asserted that all free government was based upon divine law. After tracing the progress which he felt had been made toward a better world as a result of Christian influence, he asserted that

> as a Christian people . . . jealous of their liberty and desiring to preserve the same, the state has enacted certain statutes, which, among other things, in effect, recognize the fourth commandment, and the Christian religion and the binding force of the teachings of the Saviour. Among these is the statute which prohibits sporting, hunting, etc., on Sunday.[42]

He also pointed out that the human body, "the most perfect mechanism of which we have any knowledge," needs rest and a change from daily labor. "Sunday," said the chief justice, "is like an oasis in the journey of life" where travelers may be refreshed. In fact, he suggested, such recuperation was "no doubt one of the objects of the Creator in establishing the Sabbath." In other words, he felt that "the law, both human and divine," was in favor of abstaining from "sporting"

[41] See, for example, *In re Caldwell*, 82 Neb. 544 (1908).
[42] *State v. O'Rourk*, 35 Neb. 614, 625-626 (1892).

on Sunday. Chief Justice Maxwell also saw other reasons for protecting the Sabbath from desecration. Deliberate violation of such a law might well lead to a series of infamous and ruinous offenses which would break down the moral sense of the participants and would tend to threaten the rights of some or all. Moreover, every person had the right to peace and quiet on Sunday and also the right to enforcement of the law so that an evil example of defiance of the law would not be set before his children.[43]

Neither the decision of the court nor the lengthy sermon of Chief Justice Maxwell stopped the playing of baseball on Sunday in Nebraska. A decade later, when a sheriff attempted to stop a Sunday baseball game at Nebraska City, a riot resulted.[44] A case growing out of this riot appeared before the highest court of the state in 1903. The court said that baseball was "sporting" under the statute. It insisted that the question had already been foreclosed in the *O'Rourk* case and would not be reopened. The regulation was one exclusively within legislative discretion. The legislature had been in regular session six times since the decision in the *O'Rourk* case. It was therefore "fair to presume," said the court, that

> if the law as there announced had been offensive to public sentiment, or the interpretation there put upon it had been generally regarded as erroneous, it would long since have been changed.[45]

In the next few years the attorney general was called upon several times to clarify the Sunday statute with reference to baseball.[46] In each case he cited the decision in *State v. O'Rourk* as settling the question against Sunday baseball. It made no difference, in the application of the statute, he felt, whether the baseball game in question was a "contest game" or a "practice game."

Although considered illegal, Sunday baseball was played throughout the state in defiance of the law. Its proponents much preferred that it be legalized, and toward the end of the first decade of the present century considerable pressure was brought to bear upon the legislature for the passage of a statute placing Sunday baseball under local option. This seemed the most fruitful approach since the su-

[43] *Ibid.*, 628.
[44] *Nebraska Blue Book 1915*, 112.
[45] *Seay v. Shrader*, 69 Neb. 245, 248 (1903).
[46] For example, see *Rep. Att'y Gen. 1906*, 198-199.

preme court had held the matter to be "one exclusively within legislative discretion."[47]

Bills aimed at legalizing Sunday baseball under certain conditions were introduced in the legislature in 1907 but were defeated. The following session witnessed a bitter struggle in a rather evenly divided legislature. The forces interested in legalizing Sunday baseball were led by Representative Shoemaker of Omaha and Representative Scheele of Utica. Together they introduced five bills providing for Sunday baseball. Each of these bills was in turn defeated, although in some cases the defeat was by a narrow margin. Shoemaker's first two bills were aimed at turning over the control of Sunday activities in Omaha to the mayor and council of the city. His third bill would have provided an opportunity for the citizens in Omaha and Lincoln to decide in an election whether the Sunday laws should be enforced in those cities "as to the national and innocent sport of playing baseball." Scheele represented the rural demand for Sunday baseball. His first bill would have raised all restrictions in rural areas, while his second bill provided that permits for Sunday baseball in rural areas might be issued by the county commissioners.

The legislative session of 1911 again saw a concerted drive to legalize Sunday baseball. Judging from the references in the legislative journals to petitions from citizens relative to the matter, interest must have been high throughout the state. For example, references are made to a petition signed by 556 citizens of Saunders County favorable to Sunday baseball and a similar petition from 312 citizens of Western, Nebraska opposing it.[48] Two bills, both aimed at legalizing Sunday baseball, were introduced. The first, which finally passed the legislature only to be vetoed by Governor Aldrich, would have legalized baseball playing on Sunday over the entire state between the hours of one P.M. and six P.M. It permitted municipalities, however, to regulate further or prohibit baseball playing within their limits.

The governor's veto of the Sunday baseball bill indicated his unwillingness to hold Sunday baseball illegal on moral grounds. He felt, however, that the bill, by legalizing Sunday baseball all over the state, placed an undue burden on those who opposed it by forcing them to take the initiative to have it prohibited. His major objection to the bill, which he said could easily be remedied, was that it provided no law for regulation of Sunday baseball outside of organized municipalities. As a result, he insisted, the people in the country

[47] *Seay v. Shrader,* 69 Neb. 245 (1903).
[48] *H. J. 1911,* 677-678.

"would have to submit to Sunday baseball whether a part or all of the community want it or not."[49]

Encouraged by the nearness of success, the proponents of Sunday baseball in 1913 pushed a revised bill through the legislature. This law amended the Sunday statute to provide for local option on Sunday baseball.[50] The electors in municipalities were to determine the matter and county boards were to regulate it in rural areas. This portion of the Sunday statute has remained unchanged.

The act of 1913 transferred the controversy over Sunday baseball from the halls of the legislature to the county courthouses and city halls of the state. On those governmental levels the Sunday baseball controversy continued for many years, as is attested by questions directed to the attorney general by county attorneys, ministers and others interested in Sunday baseball.[51]

Although defeated in the legislature, many of the opponents of Sunday baseball continued to agree with the delegate to the constitutional convention of 1919-1920 who commented to his colleagues during a debate over the use of the Bible in the schools that

> if I should say to you that a Nebraska legislature has sought to repeal a part of the Bible, you would smile at the thought. The Nebraska legislature has already repealed a part of the Ten Commandments. That you question? Among other things the Bible says and contains in the Ten Commandments, "Remember the Sabbath Day and keep it holy." A Nebraska legislature has said that men can go to their town and county board and procure a license to violate the sacredness of the Sabbath by a baseball game. I have as much right to go before the town board or the county board and obtain a license to steal as a man has to obtain a license to violate the Sabbath by a game of baseball.[52]

After losing the struggle for the maintenance of state-wide prohibition of Sunday baseball, those who wished to limit amusements on Sunday turned their interest to placing limitations on Sunday dancing. As a result of this influence the legislature in 1919 added "public dancing" to those activities forbidden by the Sunday statute. An exception was made, however, in that the prohibition of Sunday dancing was not

[49] For the governor's veto message see *S. J. 1911,* 725-727.

[50] *Laws 1913,* c. 10.

[51] For example, see *Rep. Att'y Gen. 1922,* 368-369. See also *Rep. Att'y Gen. 1928,* 306.

[52] Clyde H. Barnard (Comp.), *Journal of the Nebraska Constitutional Convention Convened in Lincoln December 2, 1919* (Lincoln?, n. d., 2 vols.), I, 1123. This source will hereafter be cited as *Journal of the Nebraska Constitutional Convention of 1919-1920.*

to apply to cities of the metropolitan class having a public welfare board with the authority to regulate dancing.

The public dancing provision of the Sunday statute came before the supreme court in 1929. The court decided that the exclusion of metropolitan cities from operation of the statute was class legislation prohibited by the state constitution. The court suggested that if public dancing on Sunday was scandalous and injurious to health and morals in a village or a country park, it was at least equally so in metropolitan cities. It emphasized, however, that it was not questioning the power of the legislature to prohibit public dancing on Sunday as long as such prohibition operated upon all persons alike within the classes to which the law was made applicable.[53]

The next regular session of the legislature followed the suggestion made by the court in *Galloway v. Wolfe*. It provided that public dancing on Sunday was not prohibited in cities or villages where it was supervised and regulated by municipal authorities. Furthermore, the statute set up rules for supervision of rural dances by deputy sheriffs. The provisions of the statute placing the regulation of Sunday dancing under local option have remained unchanged since that time.[54]

Nebraska's Sunday statute makes no specific mention of stage shows, movies, or similar kinds of entertainment. Doubt and disagreement as to whether such activities were prohibited by the Sunday statute have therefore been common in Nebraska. As early as 1897 an unsuccessful attempt was made to prohibit all kinds of stage shows, boxing matches, circuses and similar performances on Sunday.[55] The application of the Nebraska law to such performances was clarified by the supreme court in 1902.[56] The court decided that a stage troupe whose performance consisted of music, dancing, and feats of contortion was not violating the Sunday statute by performing on Sunday. The court was unable to see that such a performance fell under the definitions of "common labor" or of "sporting." It refused to consider the religious implications of Sunday "because, under our form of government, all so-called Sunday laws, whatever the motives that inspire them, are purely municipal or police regulations." In view of that fact, the court insisted, "whether such performances should be permitted on Sunday is a question exclusively for the legislature."

The growing popularity of movies in the second and third decades of the present century necessitated decision as to the legality of Sun-

[53] *Galloway v. Wolfe*, 117 Neb. 824 (1929).
[54] *R. R. S. 1943*, sec. 28-940.
[55] *H. R.* 447 (1897).
[56] *Wirth v. Calhoun*, 64 Neb. 316 (1902).

day showings. Apparently the first attempt to define their status by legislative action came in 1917. Three bills dealing with the matter were introduced in the legislature and all failed to pass. One would have legalized moving pictures on Sunday; another would have turned the matter over to local option; and the third would have made Sunday movies illegal unless conducted "for the exclusive benefit and gain of religious or charitable purposes." Although other attempts were made to legislate concerning the matter, the legislature, contrary to its practice with baseball and public dancing, passed no legislation regulating the showing of movies on Sunday. This meant, in effect, that municipalities, through the police power delegated in their charters, were expected to deal with the local situation as they saw fit.

The supreme court supported the local option point of view in 1920 when it upheld the right of a city to prohibit Sunday movies.[57] Likewise, the attorney general in several opinions has advised that cities and villages may permit or prohibit the showing of Sunday movies. Thus, the regulation of Sunday movies, like the regulation of Sunday baseball and Sunday dancing, was left to local option.

It has also been necessary at various times to clarify the Sunday statute with reference to certain other types of entertainment. At times general legislation was proposed with the purpose of specifically excluding certain entertainments from the operation of the Sunday statute. Such was the case when trapshooting became a popular sport in Nebraska. In 1925 and again in 1931 attempts were made to insure its legality by excluding such "shoots" from the operation of the Sunday law. At other times, general legislation would have specifically prohibited certain types of entertainment. Such action was contemplated by a bill introduced in the legislature in 1923 which would have prohibited the State Fair from being open on Sunday. Although not specifically amending the Sunday statute, the law of 1935 which legalized pari-mutuel betting in Nebraska prohibited Sunday racing. It thus had the practical effect of amending the Sunday statute.[58]

Often forms of popular entertainment were already open to regulation by municipalities under the powers granted in their charters. Such was the case with reference to the operation of a swimming pool on Sunday.[59] Attempts at general legislation were usually aimed either at legalizing activities prohibited by local ordinances or at imposing limitations where local authorities had failed to do so. The unsuc-

[57] *Dillard v. State*, 104 Neb. 209 (1920).
[58] *Laws 1935*, c. 173.
[59] *Rep. Att'y Gen. 1924*, 660.

cessful attempt in 1917 to force closing of all pool or billiard halls in the state on Sunday illustrates the latter.

Nebraska, like all other states, limits the activities of its courts on Sunday. Statutes with this as their purpose have long been a part of Nebraska law. One statute, which has gone substantially unchanged for almost one hundred years, provides that no court can be opened nor any judicial business transacted on Sundays or any legal holidays, with the following exceptions:

(1) to give instructions to a jury then deliberating on a verdict,
(2) to receive or discharge a jury,
(3) to exercise the powers of a single magistrate in a criminal proceeding, and
(4) to grant or refuse a temporary injunction or restraining order.[60]

Several times the supreme court has been called upon to determine what constitutes "judicial business" prohibited on Sundays and holidays by the statute. While much of the litigation has involved holidays rather than Sundays, it would seem reasonable to assume that like classification would result in like interpretation.

In 1884 the court held that although the statute did not "apply strictly" to county courts, the common law would not permit a writ of replevin to be served on Sunday.[61] A few years later the same court held that an order of attachment issued by a judge on a debt past due was not "judicial business" under the meaning of the statute, but was purely a ministerial act.[62] It was quite a different matter, however, if a judge allowed an attachment on a claim not due. Such an act required the "exercise of judicial power" and so was illegal under the statute prohibiting judicial business on Sunday.[63] When a jury renders a verdict on Sunday and the law requires a justice of the peace to render a judgment immediately, it is his duty to do so and such action does not conflict with the statute prohibiting judicial business on Sunday.[64] It has also been held that when the last day for filing an appeal bond falls on Sunday, a county judge may approve the appeal bond. The court felt that while this "may have been an act judicial in its nature" it was not "judicial business" prohibited by

[60] *R. R. S. 1943,* sec. 24-316.
[61] *Bryant v. State,* 16 Neb. 651 (1884).
[62] *Whipple v. Hill,* 36 Neb. 720 (1893).
[63] *Merchants Nat. Bank of Omaha v. Jaffray,* 36 Neb. 218 (1893).
[64] *Thompson v. Church,* 13 Neb. 287 (1882).

the statute on Sunday.[65] The attorney general has advised that opening a court on Sunday to set bond for a speeder is authorized by the statute. Such action, he thought, fell under the third exception set out in the statute, that of exercising the powers of a single magistrate in a criminal proceeding.[66]

Another statute of long standing affecting judicial proceedings is to be found under civil procedure regulations.[67] It stipulates that if in computing the time within which an act provided under the civil procedure regulations is to be done, the last day is Sunday, "it shall be excluded." This provision has been held to mean that the necessary action may be taken on the following Monday.[68] The court held this to be the case when the last day of the two-year period for redemption of land sold for delinquent taxes fell on Sunday.[69] Since this is a general statute, however, it does not control where there is special provision directing the computation of time.[70]

Several conclusions might be drawn from the history of Sunday laws in Nebraska. First, Nebraska Sunday legislation has had the effect of making some activities which are legal on other days illegal on Sunday, the holy day observed by Christians. Such legislation tends at least indirectly to support Christian groups. Certain businesses and business procedures, certain amusements, and certain court activities have throughout the history of the state fallen under the ban of Sunday laws. The general tendency, however, has been toward expansion of Sunday activities, especially in the amusement field. The change from statewide prohibition of certain Sunday activities to local option has been the legal procedure most often used to expand Sunday activity. Second, in the earlier days of the state the religious basis for Sunday legislation was sometimes openly stated by legislators and courts. The more recent tendency has been to interpret such legislation as being based upon the police power alone. Thus, although the actual motivation behind such legislation was largely religious, the courts will uphold it only for other reasons. Any support rendered to religious groups by Sunday legislation is considered purely incidental. Third, the Nebraska courts have insisted that an activity to

[65] *Deere, Wells and Co. v. Hodges,* 59 Neb. 288 (1899). The normal procedure would be to file the appeal bond on Monday.

[66] *Rep. Att'y Gen. 1942,* 32-33.

[67] The current statute is *R. R. S. 1943,* sec. 25-2221.

[68] *Johnston v. New Omaha Thomson-Houston Electric Light Co.,* 86 Neb. 165 (1910).

[69] *Counselman v. Samuels,* 93 Neb. 168 (1913).

[70] *Garrett v. State,* 118 Neb. 373 (1929).

be held illegal on Sunday must be prohibited by statute. In other words, it is a legislative function to determine what may or may not be done on Sunday. Finally, since, as most Nebraskans know, the Sunday statutes are not very vigorously enforced, further amendment of the laws or even elimination of them may be expected in the not too distant future, following the trend of other states. Even in this event, however, Sunday will still remain a day apart, for the lives of most citizens of the state have been adjusted to the view that Sunday is different from other days.

6 / *Religion and the Public Schools: Background*

THE field of education has been the arena in which the most vigorous battles over the relationship of church and state have been fought. The major controversies have been in the field of elementary education, although secondary education has also been affected. The proper relationship has involved much less tension, as well as attention, in higher education. Perhaps education has been the most controversial area because Americans have placed great faith in the power of education, especially "public" education, to solve the economic, political, moral and social problems with which they are confronted. They have, therefore, in the last century made education one of their major public enterprises. Almost every individual is affected directly by public education either through taxation for its support, or through compulsory school laws which require attendance of all. Because of the compulsory laws, youthful representatives of all the multitudinous religious denominations are thrown together for instruction. Parents, aware of the ease with which children are influenced, have jealously watched the schools for indications of proselyting. Thus, it would appear, because of his faith in education and because of its direct relationship to him, the average American has observed the schools closely.

The importance of education for church-state struggles may also result from the fact that in recent years the state has became what some have described as a direct competitor of traditional religions. The term usually used to describe this development is "nationalism." As a competitor, the state has recognized the state-controlled school systems as major avenues for propaganda, and has increasingly refused

to permit other agencies, especially the church, to share the privilege of educating the youth. Such practice by the Nazis, Fascists and the current Russian government is common knowledge. It seems not too unrealistic to see part of the same desire for complete control of the education of youth in the interests of the state underlying the opposition to the parochial school or even to the released-time programs in the public schools. One of the most common arguments used in opposition to the parochial schools or the "released-time" programs is that they are "divisive."

Recently church-state problems in education have received nationwide attention as the result of widely publicized decisions of the United States Supreme Court[1] and the controversy over federal aid to education.

When comparing the legal status of certain practices in Nebraska schools with similar practices in other states, it is well to keep in mind that court decisions are based on the particular provisions of state constitutions. It is also well to remember that under a Nebraska statute dating from 1881 the superintendent of public instruction has the power to decide disputed points in school law. In fact, the law provides that his decisions "shall be held to have the force of law until reversed by the courts."

The "public" or "common" school is usually defined as a school supported by taxation; available to all children free of expense; and under the control and superintendence of the voters of the community. Attempts have been made, especially by certain exponents of private schools, to define those parochial schools which are open to all children free of expense as public schools. This is not, however, the generally accepted definition either legally or in the language of the ordinary citizen.

Public education has been largely a state rather than a federal function. Thus, a summary of the historical development of American public education must necessarily consider the development in the individual states. This might well be a confusing and almost impossible task, but, happily, certain principles have been widely accepted.

The most important principle of American public education is that elementary education must be supported by taxation of all and be free to all. As the Beards point out, this idea "found no expression in colonial America," for it had been foreign to the experience of the

[1] Most controversial in recent years was *Ill. ex rel. McCollum v. Board of Education,* 333 U. S. 203 (1948).

[2] Charles A. Beard and Mary R. Beard, *The Rise of American Civilization* (New York, 1930, 2 vols.), I, 177.

West.[2] It was only in the years after 1825 that this principle was gradually accepted. Cubberley states that by 1850 tax-supported schools "were becoming an actuality in almost every Northern State."[3]

Another important principle of public education in the United States is that it is the duty of the state to see that the young are educated. Compulsory attendance, therefore, of children between certain ages at some school, public or private, is required. The first modern compulsory attendance law was passed in Massachusetts in 1852. According to Cubberley's figures, no other state followed Massachusetts' example until after the Civil War. Then, other states and territories rapidly fell into line with similar requirements. The major opposition to this movement was the claim that compulsion invaded parental rights. By 1897, however, thirty states had such provisions, and all states had them by 1918.[4]

Since about 1900 there has been a general revision of the compulsory education laws of the states. This revision has extended the required attendance period, eliminated most excuses for nonattendance, and generally tightened attendance requirements through the maintenance of more complete records and the provision for truant officers. The conclusion of Cubberly that "having taxed their citizens to provide schools, the States have now required the children to attend and partake of the advantages provided," seems quite valid.[5]

A third principle of American public education is that public school funds must not be used for sectarian purposes. The adoption of this principle has meant that public schools and the tax funds for their support must be controlled by public officials rather than by private or sectarian groups. It has also meant that public funds may not be used to support sectarian instruction in the public schools.

In the colonial and early national periods secular and religious matters were not kept separate. Not only did the church dominate education, but the state aided it with donations of land and money. Several factors in the first half of the nineteenth century coalesced to change this *modus vivendi*. The labor groups of the Jacksonian period insisted that education was the duty of the state, and the multiplication of religious groups, especially as a result of Roman Catholic immigration, also emphasized the necessity of state control of public funds.

[3] Ellwood P. Cubberley, *Public Education in the United States* (Boston, 1919), 119.

[4] Edgar W. Knight, *Education in the United States* (2nd rev. ed., Boston, 1941), 501.

[5] For a more complete summary of this trend see Cubberley, *Public Education in the United States*, 380-381.

With the taxation of all for the support of public education and later with compulsory attendance requirements, it became increasingly obvious that in the interest of religious freedom some limitation must be put upon the use of public funds and facilities. The issue was dramatically brought to the attention of the nation by the demand of Bishop Hughes of New York for state funds to aid Catholic parochial schools. As a consequence, beginning in the 1840s, state after state adopted constitutional amendments which forbade the diversion of public school funds to sectarian schools. No state admitted to the Union after 1858 except West Virginia failed to insert such a provision in its first constitution.[6] In fact, "every State admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system 'free from sectarian control.' "[7]

Although the controversy over the use of public funds for sectarian purposes was drowned out by the controversy preceding the Civil War and by the war itself, in the immediate postwar period it again appeared as an issue of national importance. President Grant, in an address to the Army of Tennessee delivered at Des Moines, Iowa, on September 29, 1875, proposed that Americans should "encourage free schools and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools." He felt that neither the state nor nation should support schools which failed "to afford every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan or atheistical dogmas." "The matter of religion," he stated, should be left "to the family altar, the church, and the private school, supported entirely by private contributions." In the same year Grant recommended a constitutional amendment forbidding the teaching of religious tenets in the public schools and forbidding the granting of school funds "for the benefit or in aid, directly or indirectly, of any religious sect or denomination." An amendment was introduced by James G. Blaine in 1876 which aimed at incorporating Grant's suggestions into the fundamental law. Although the amendment passed the House of Representatives by a large majority, it failed to receive the necessary two-thirds in the Senate. The Republican platform of 1876 favored an amendment to prevent the use of public funds "for the benefit of any school or institution under sectarian control."[8] Although a number of

[6] *Ibid.*, 180-181.
[7] *Ill. ex rel. McCollum v. Board of Education,* 333 U. S. 203, 220 (1948).
[8] Zollmann, *American Church Law,* 75-76.

states had already adopted provisions preventing the diversion of public funds to private schools, the agitation for a federal amendment provided the impetus for additional states to take the same action.

Closely related to the provisions forbidding state aid to sectarian schools were similar requirements adopted by the states which prohibited sectarian instruction in the public schools. A study made for the United States Office of Education in 1930 showed 30 states with such provisions at that time.[9]

The development of the Nebraska public school system parallels quite closely that of the nation. In Nebraska, as elsewhere, it is around the constitutional provisions adopted and the statutes passed during the course of this development that the major controversies over the relationship of church and state have raged.

The original school law of the Nebraska territory gave school districts the power to levy a tax for schools. When, however, the district treasurer had insufficient funds to pay the teachers, the law provided that the balance due should be "paid by the persons sending pupils in such manner as may be agreed upon by the teachers and the district board."[10]

In his address to the legislature on January 6, 1857, the territorial governor, Mark W. Izard, clearly stated his views on the school system as follows:

> In view of the many blessings that are dependent upon the general spread of knowledge, I cannot too strongly urge upon you the duty of at once putting into operation a system of common schools adequate to the rapidly increasing demands of our people. In all the elements of material prosperity we have reason to be abundantly satisfied with our condition; but no degree of wealth, no extent or fertility of soil, no amount of population can compensate us for the want of a good and efficient system of education. Laws, judiciously framed and faithfully administered, are necessary to punish crime, but the intelligence and virtue of the masses constitute the only true basis for its prevention.[11]

While further insisting that the current school law was "in most respects a good one," he urged that it be made more effective. He warned, however, that although it was "usual in the States to levy a

[9] See Ward W. Keesecker, *Legal Status of Bible Reading and Religious Instruction in Public Schools* (Office of Education Bulletin No. 14, Washington, 1930), 4-5.

[10] *Terr Laws 1855,* (1st Sess.), 212-221.

[11] *Journal of the Council . . . of the Territory of Nebraska . . . . 1857,* (3rd Sess.), 16.

tax for this purpose" in a new country where the majority of the land titles still remained in the government, such a tax would probably not be effective "without operating too oppressively upon our people." His immediate suggestion, therefore, was to work for the supplementation of the current funds by having the "benefits intended to be conferred" by the federal donation of sections sixteen and thirty-six in each township made immediately available for use. He recognized, nevertheless, that when more of the land of the territory had passed into private hands, the difficulties would be removed "and the ordinary sources of revenue for this purpose can be resorted to." By 1860 the legislature apparently felt that the needs for an improved education law were such that legislation was passed providing that:

> For the purpose of affording the advantage of a free education to all the white youth of this territory, the territorial common school fund shall hereafter consist of such sum as will be produced by the annual levy and assessment of one mill upon the dollar valuation on the grand list of the taxable property of the territory, and there is hereby levied and assessed annually in addition to the revenues required for general purposes the said one mill upon the dollar valuation as aforesaid, and the amount so levied and assessed shall be collected in the same manner as other territorial taxes, and when collected shall be annually distributed to the several organized counties of the territory in proportion to the enumeration of scholars, and be applied exclusively to support of common schools. Provided, that all colored persons shall be exempt from taxation for school purposes.[12]

Six years later the first Nebraska constitution provided that the legislature should "make such provisions by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state."[13] The first statute of the new state on this subject was an exact copy of the territorial statute of 1860 cited above.[14]

That this early law did not provide all that was hoped for may be inferred from the subsequent history of the Nebraska public school system. Governor David Butler's address to the legislature in 1868 emphasized that "notwithstanding the many subjects of great moment, with the grave interests involved in them, that will engage the attention of the next Legislature, the perfecting of our system of instruction

[12] *Terr. Laws 1859,* 89.
[13] *Const.* Art. VII, sec. 1 (1866).
[14] *R. S. 1866,* 372.

in importance surpasses them all."[15] Successive legislatures have found it necessary again and again, as the public school system has been enlarged and improved, to deal with the problem of providing funds for the school system of the state. There is no indication, as yet, that a satisfactory solution to the problem has been found.

According to "Nebraska School Facts, 1868-1869—1949-1950," a mimeographed summary prepared by the Nebraska Department of Public Instruction, enrollment in Nebraska public elementary and secondary schools increased from 12,719 in 1869-1870 to a peak of 327,417 in 1923-1924 and dropped back to 227,879 in 1949-1950. Figures for the number attending under the free high school law, the report indicates, were not available until 1922-1923 at which time 14,529 were in attendance. This figure reached a peak in 1941-1942 with 25,787 in attendance and dropped back to 20,513 in 1949-1950. The summary shows total current expenses as $143,535 in 1869-1870. This item, with minor fluctuations, has increased steadily to a total of $43,244,437.64 in 1949-1950.

It may safely be assumed that not all Nebraskans accepted the principle of general taxation for the schools. In fact, B. S. Newsom, speaking to the members of the constitutional convention of 1871, voiced the opinion heard in all states that "I do not believe it to be sound law to take my property under the educational system; to make me educate another man's child; but public policy may acquiesce in it."[16] Nevertheless, the majority of Nebraskans, speaking through their legislature, provided early in their history for taxation of all for the education of all. They thus accepted a basic principle of American education and were keeping in step with the national trend toward universal free education of the youth.

The principle of compulsory attendance for all children was not adopted in Nebraska until 1887,[17] although concerted efforts were made earlier to incorporate it into Nebraska law and practice.

The first serious attempt to establish compulsory school attendance came in 1871. Early in the constitutional convention of that year J. D. Neligh offered a resolution to the following effect:

> WHEREAS; the State of Nebraska has exhibited a commendable liberality in the cause of Education in a most munificent manner, by her common free school law, and that the only consideration that the State expects in return for the burden of

[15] Quoted in *S. J. 1868,* 292.
[16] *Report of the Constitutional Convention of 1871,* I, 275.
[17] *Laws 1887,* c. 78.

> heavy taxation which the support of the free schools imposes upon her people, is the repression of crime and the moral advancement of human progress: Therefore be it
>
> RESOLVED: That while it takes just as much of the people's money and costs equally as much to carry on our common free schools whether children attend or not, parents and others who have children under their care and control of sufficient age for scholars, should be compelled by law, to send all such children to the common schools.[18]

This resolution was referred to the convention's committee on education, school funds and lands, which several weeks later returned a suggested provision on compulsory education which would have made mandatory the passage of laws to require that

> every child of sufficient mental and physical ability, between the ages of six and sixteen years, unless educated by other means, shall attend a public school supported by the common school fund, for some definite length of time each year, to be fixed by law.[19]

It also provided for reform schools to take care of those who were "growing up in mendicancy, ignorance, idleness or vice."

In the course of lengthy debates on the school provision in which the main issue was compulsion, arguments both for and against the proposal were ably presented. Those opposed to a compulsory school law insisted that parental rights were invaded by forcing the child to go to school. B. S. Newsom denied that children belonged to the state and maintained that "this doctrine of compulsory education may do in monarchial governments in the old countries, but it will not do in free America." One of the delegates asserted that "a father would be justified in standing at the door with his gun in his hands" to keep his child from being compelled to go to school. What's more, he asserted, such a man "would have a right to call on his neighbors to assist him in thus defending his rights."[20] Another less bellicose delegate suggested that just as in "olden times" it was thought right to encourage Christianity by the establishment of state churches, so now "in later days they have established state schools." The result, he implied, would be the same, just as the state church could not "live side by side with free churches," so really free education could not exist with state education. He closed his remarks with the comment

[18] *Report of the Constitutional Convention of 1871*, I, 120.
[19] *Ibid.*, 269.
[20] *Ibid.*, II, 222.

that the tendency of the age was "to overeducate the children, thereby greatly impairing their health." Others insisted that the state should only undertake to educate if the parent neglected his duty of properly educating the child. Still others held to the view that the proper procedure was to "erect school houses, give the children the chance to attend, and if they do not embrace the opportunity, the state is not to blame."[21]

Those members of the convention who favored a compulsory education provision as part of the constitution insisted that no conflict with parental rights was involved. Compulsory education, they claimed, was based on the principle which requires the parent "to place his child upon the high road to respectability and prosperity."[22] In fact, one ardent proponent went so far as to assert that "the right to preserve children of the state from ignorance and vice" was superior to all other rights.[23] After pointing out that the state, as represented by the courts, had at times taken children from their parents, Judge Lake suggested that although it had been argued that the children did not belong to the state,

> yet this is true to some extent. If not, why are we taxed for the common school fund? If the State has not the right to say that the parent shall send the child to school, shall it say to the parent who is willing to educate his own children that he shall contribute to the school fund for the education of others?[24]

For the judge it was "the high duty of the State to see to it that these little ones are protected and educated." E. S. Towle supported compulsory education on the grounds of economic protection. The state, said he, had the right to enforce education because

> if the child is brought up in ignorance and crime upon whom does the wrong rest? Upon the State, and no other party. If he is put in the penitentiary, it is the people who pay for it: it comes out of the pocket of the individuals who own property in the State; and they have the right to say that in the beginning, in the youth, this twig shall be bended in such direction, and shall not be found in the poor house, in the penitentiary; that he shall not be hanged from the gallows, but so guided, that the influences may be thrown around him on the side of virtue and intelligence; and that the taxes of the people and the

[21] *Ibid.*, 230.
[22] *Ibid.*, I, 272.
[23] *Ibid.*, II, 219.
[24] *Ibid.*, I, 273.

> taxes of the State shall not be used hereafter and appropriated for the purpose of keeping and directing that child.[25]

D. J. McCann pointed out that the proposed section contained the proviso "unless educated by other means," which permitted schools other than the common schools to exist. The compulsory education provision was not to "compel a man to educate his children in a college, or any particular school." Rather, he said,

> we insist that every child shall be educated in some school. I care not where—it may be in a denominational school, the convent or the public school; but these little charges of the commonwealth must be educated. Educate them where you please, give the choice to the parents, and do not restrain them, but insist that they shall be educated somewhere.[26]

Here one has an excellent statement of the American faith in education per se. E. Estabrook of Douglas County charged that some of the opposition to the free school system came from what he called "religious bigots" who "believe that children should be educated in a certain religion and this state does not propose to allow religious matters to become mixed up with our public schools."[27]

The convention strategy of the group opposed to compulsory education seems to have been to have the compulsory school provision presented to the electorate as a separate provision on the assumption that public opinion would not uphold the proposition. Although the proponents of the compulsory education section desired it to be presented as a part of the constitution, the convention voted twenty-five to fifteen, with twelve absent or not voting, to present it as a separate section. The proposal presented to the voters read as follows:

> The legislature shall require by law that every child of sufficient mental and physical ability, between the ages of eight and sixteen years, unless educated by other means, shall in all cases where practicable attend a public school supported by the common school fund, for some definite length of time each year, to be fixed by law, and shall establish a school or schools for the safe keeping, education, employment, and reformation of all children under sixteen years of age without proper paternal care, who are growing up in mendicancy, ignorance,

[25] *Ibid.*, 276.
[26] *Ibid.*, II, 224.
[27] *Ibid.*, 250.

> idleness or vice, which school shall constitute a part of the system of common schools.[28]

Those opposed to the measure seem to have read public opinion more accurately than the proponents. The constitution as a whole was defeated by the narrow margin of 7,986 to 8,627, while the compulsory education proposition was defeated 6,289 to 9,958.[29] It is interesting to note that four other separate propositions were submitted at the election. These included a proposal for woman suffrage and a proposal to submit a prohibition proposition to the voters. That the compulsory education issue was of major interest to the voters is illustrated by the fact that more votes were cast for and against it than were cast on any of the other four separate propositions.

A survey of the records of the constitutional convention of 1875 yielded no indication of a struggle similar to that of 1871 over compulsory education. This fact, however, does not mean that no such struggle occurred, for the records of the convention of 1875 are meager indeed. The minutes were lost and the published records include little more than the bare journal. The constitution makers stipulated only that "the legislature shall provide for the free instruction in the common schools of the state of all persons between the ages of five and twenty-one years."

In the years following 1875 various attempts were made to pass legislation compelling school attendance. Success came in 1887 when the legislature passed a law providing as follows:

> It shall be unlawful for any parent or guardian living in the state of Nebraska to neglect or refuse to cause or compel any one person or persons who are or may be under their control as children or wards to attend and comply with the rules of some one or more public or private school, or schools, for a term of twelve weeks or more during each successive year from the time the said children or wards are eight years old until they are fourteen years old inclusive. Unless they may be prevented by illness, poverty, inability or by reason of already being proficient, from attending such public or private school or schools and
>
> *Provided,* That in such case they shall be excused by the board of education of the school district in which said children or wards may live at the time of such failure to attend such public or private school or schools.[30]

[28] *Ibid.,* 261-262.
[29] *Ibid.,* III, 500.
[30] *Laws 1887,* c. 78.

Agitation began almost immediately for legislation strengthening and tightening up the requirements of the compulsory education law. In 1899 and 1901 machinery was set up for checking on attendance and for punishing violators.[31] In 1903 the age limits of children included in the act were expanded from eight—fourteen to seven—fifteen.[32] This process of tightening up the machinery and extending both the age limits of the children and the number of weeks in the annual school term has gone on until in 1954 the law provided that

> every person residing in a school district within the State of Nebraska who has legal or actual charge or control of any child, not less than seven nor more than sixteen years of age, shall cause such child to attend regularly the public, private, denominational, or parochial day schools for a period of not (1) less than one hundred sixty days, in districts maintaining nine months term, or (2) less than one hundred forty-five days, in districts maintaining an eight months term, unless such child has been graduated from high school . . . . Under no circumstances shall the school term be less than eight months.[33]

In addition, blind and deaf children are required to attend special schools,[34] careful attendance records must be maintained by all school authorities[35] and attendance (truant) officers are available to compel children "to attend some public, private, denominational, or parochial school, which the person having control of the child shall designate."[36]

Thus, as with free public education, Nebraskans followed the national trend and adopted a second basic principle of American education, that of compulsory education.

Judging from their state constitutions, the majority of Nebraskans have felt from the beginning that there should be neither sectarian control of public funds nor sectarian instruction in the public schools. The term "sectarian" has not been clearly defined and most of the major controversies concerning the church-state issue in the public schools of Nebraska have resulted from lack of common agreement on its meaning. Therefore, a survey of the history of the constitutional provisions bearing on sectarianism and the schools is essential to an understanding of the controversies. The first Nebraska constitution, borrowing from the Northwest Ordinance of 1787, declared that

[31] *Laws 1899*, c. 67 and *Laws 1901*, c. 70.
[32] *Laws 1903*, c. 95.
[33] *R. S. C. S. 1953*, sec. 79-201.
[34] *R. R. S. 1943*, sec. 79-204.
[35] *Ibid.*, secs. 79-207, 79-208, and 79-209.
[36] *Ibid.*, secs. 79-210 and 79-211.

> religion, morality, and knowledge . . . being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.[37]

It thus seemed to link religion and education. The same section, however, provided also that

> no person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted.[38]

To make its intent even clearer, the constitution stated that although the legislature should make provision for the support of the common schools, "no religious sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of this state."[39]

The problem of the relationship of sectarianism and the public schools aroused considerable interest in the constitutional convention of 1871. The proposed constitution in its bill of rights provided that

> no person shall be required to attend or support any ministry or place of worship; nor shall any preference be given by law to any religious denomination or mode of worship.[40]

In the school article, when school funds were discussed, continued reference was made to their use for "common schools" and "district schools."[41] This would indicate that the intent was to limit the funds to such schools. Section two of the same article, however, read as follows:

> All lands, money or other property granted, or bequeathed, or in any manner conveyed to this state for educational purposes,

[37] *Const.* Art. I, sec. 16 (1866). This statement is still a part of the constitution. It has been suggested that constitutions of states which contain this and similar statements may provide some legal justification for some fundamental religious instruction.

[38] *Const.* Art I, sec. 16 (1866).

[39] *Ibid.*, Art. VII, sec. 1 (1866). This provision antedates the national agitation for an amendment by ten years.

[40] *Report of the Constitutional Convention of 1871,* III, 437.

[41] See Art. VII, secs. 3, 4, 5, and 6 of the proposed constitution of 1871 as quoted in *Ibid.*, 455-456.

> shall be used and expended in accordance with the terms of such grant, bequest, or conveyance.[42]

This worried some members of the convention who insisted that "under the provisions of that section, it may be possible to make the State the educator of sectarian views."[43] The majority felt, however, that this section was aimed at preventing the disregard of the desires of those who granted funds to the state for educational purposes. Moreover, it was claimed, the danger of sectarian instruction was not too great since those desiring to help a particular sect would normally grant the money to an institution of that sect.[44] On the following day those who were concerned about this matter succeeded in amending another section to provide that the state should not "accept any grant, conveyance or bequest of money, lands or other property, to be used for sectarian purposes." The convention of 1871 also incorporated a provision stating that "no sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes."[45]

The constitution of 1875 contained essentially the same provision for its bill of rights as was included in the constitution of 1866.[46] It also copied verbatim Article VII, section 13, of the abortive constitution of 1871, which read:

> No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes; nor shall the state accept any grant, conveyance, or bequest of money, lands or other property to be used for sectarian purposes.[47]

In 1920 when a constitutional convention suggested major amendments to the Nebraska constitution, further safeguards were established against sectarianism by enlarging Article VII, section 11, to provide that

> neither the state Legislature nor any county, city or other public corporation, shall ever make any appropriation from any public

[42] Art. VII, sec. 2 of the proposed constitution of 1871 as quoted in *Ibid.*, 455.

[43] *Report of the Constitutional Convention of 1871,* I, 257.

[44] For the complete discussion, see *Ibid.*, I, 257-266.

[45] *Ibid.*, III, 456-457. This was included in Art. VII, sec. 13.

[46] *Const.*, Art. I, sec. 4 (1875). Note that this is the current constitutional provision. Compare this section with *Const.* Art. I, sec. 16 (1866).

[47] *Const.* Art. VIII, sec. 11 (1875). This is the current provision.

> fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof.[48]

Thus, the development of the Nebraska public school system parallels that of the nation. In fact, the development of American public education with the acceptance of the principles of taxation of all for the compulsory education of all without sectarian influence can be seen written small in Nebraska history.

[48] *Const.* Art. VII, sec. 11 (1875-1920). The amendments of 1920 necessitated renumbering and this was the same as the former Art. VIII, sec. 11 cited above.

7 / *Religion and the Public Schools: Development*

Out of the development of the American public school system has come a number of problems involving the relationship of church and state. This study is concerned mainly with the Nebraska problems, but the same problems also exist nationally. This fact must be continually kept in mind, for these issues, when considered thoughtfully, assume major proportions in the American educational picture.

The central problem, with many facets, is that of establishing and maintaining in the public schools what some call "the fundamental principle of separation of Church and State." While Americans, almost without exception, accept the so-called "principle" as a good thing, most of them have given little thought to it. Those who have given it some thought have differed widely in their interpretation of the meaning of the "principle." The result has been that while most Americans subscribe in some fashion to the traditional dogma of "separation of Church and State," it has a hazy and ill-defined meaning for them.

One facet of the problem, as Henry P. Van Dusen[1] points out, is the difficulty which arises from the fact that religion, a term which is commonly substituted for "church," has an inherent duality of meaning. It has meaning as an integrative force and also it has quite specific denominational or sectarian meaning. The Nebraska constitution recognizes religion in the integrative sense in the Preamble, where gratefulness is expressed to "Almighty God." Likewise, in Article I,

[1] *God in Education* (New York, 1951), 66-68.

"religion, morality, and knowledge" are recognized as "essential to good government." In addition, religion, in the more general sense, as Stokes points out, "has been so identified with the ideals and achievements of the human race that to leave it entirely out of historical or social studies is impossible."[2] The same might be said for literature, ethics and philosophy. In this sense, then, religion cannot be separated from education if a well-balanced curriculum is to be maintained.

It was apparently with this duality of meaning in mind that the constitutional provisions of various states, including Nebraska, were phrased so as to eliminate from the public schools not *religion* but rather "sectarian instruction" or grants to "any sectarian or denominational school or college." The term "sectarian," when used in relation to education in constitutional provisions and statutes, has usually meant "denominational." There has not been, however, a clear working definition which can be applied under all conditions. Particular situations have clouded the general principle of non-sectarianism in public education. This uncertainty has been especially evident with reference to Bible reading in the public schools. The problem of whether such reading is sectarian or not has been carried to the highest courts of a number of states and different interpretations have been placed upon it by different courts.

It would seem that while Americans usually subscribe to the principle of separation of church and state, they have never completely accepted, either in theory or in practice, the idea that religion must be kept entirely out of their schools. On the other hand, they have attempted to eliminate sectarianism. Here they have discovered, not a precise line dividing the sectarian from the non-sectarian, but, rather, a broad "twilight zone" in which differences of opinions and practices frequently occur.

Another and, perhaps in the long run, more important facet of the problem of the relationship of church and state in the schools concerns increasing secularism in the public schools. The public school, with vast resources gained from general taxation, with compulsory attendance, and with relatively good teaching, has moved to the center of the cultural stage. Coincident with its tremendous growth has been a gradual turning away from religious (used in the integrative sense) instruction in the public schools. The common argument supporting such a trend has been stated thus:

> The public school is a piece of state machinery organized and supported for purely secular ends. Its function is not to

[2] *Church and State,* II, 572.

> make or unmake Christians, or to educate children in this or that form of religious faith. Its function is to prepare for citizenship. It eschews religious education. Its work is carried on from the point of view of utility to the state. In short, its purpose is secular education with no meddling in the province of the church.

Likewise, the same authors hold that

> the pervading constitutional principle of the various states is that the state as such has nothing to do with religion beyond affording to the people protection in the enjoyment of their religious rights and convictions. This principle enjoins upon the state the duty to afford to every citizen, so far as religion is concerned, impartial protection, but to stop there. This gives religious truth and its friends a fair and open field without patronage and without hindrance.[3]

The above is not an exactly fair analysis, for the atmosphere of the public school is not free of pressures. The omission of religion from the curriculum may have a serious effect upon the child's religious conscience and consciousness, for unintentionally it leaves the impression that religion is only incidental to life. Sir Walter Moberly described the situation as follows:

> It is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary you teach that it is to be omitted, and that it is therefore a matter of secondary importance. And you teach this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby insinuate it silently, insidiously, and all but irresistibly.[4]

The failure of the public school to inculcate religious principles would not be so serious were it not that the vast growth of the public school system has caused the family to abdicate its ancient function of teaching. At the same time, other types of religious instruction have become largely peripheral. The Sunday School and Bible School afford no satisfactory solution to the problem. The result is a growing ignorance of religious principles. It should be remembered that American political institutions and American ideas of morality have developed out of the background of western Christianity and have been profoundly influenced by it.

[3] Alvin W. Johnson and Frank H. Yost, *Separation of Church and State in the United States* (Minneapolis, 1948), 260.

[4] Sir Walter Moberly, *The Crisis in the University* (London, 1949), 56.

Many educators agree that true education is more than the acquisition of facts and methods. It also includes "character training" or "training in morals." Alexander Meiklejohn calls these "spiritual" lessons and insists that the interpretation of them "is a public enterprise of the highest order." He insists that "our American education has been robbed of its spiritual sustenance by the sterile negativism of a separation doctrine."[5] Professor Zollman is even more insistent. He claims that

> the consequences of a godless education can be studied to-day at close hand in any penitentiary, house of correction, or reform school. They are vitally felt by every teacher from the kindergarten to the University and by every business man from the corner grocer to the president of the most powerful bank. They fill the courts with litigation, the jails with inmates, and the cemeteries with corpses.[6]

The galaxy of problems which centers around the principle of the separation of church and state in public education might be summarized as follows: First, since the church and state cannot be completely separated so long as both exist, the problem becomes not how can the church and the state be kept apart, but rather, how best can they cooperate for the general welfare? Second, since more effective instruction is needed, both for the betterment of the individual and the commonwealth, in the moral principles which are similar to spiritual or religious values, how best can that be accomplished? These are the problems, sometimes realized and sometimes not, over which controversy has raged in the schools of Nebraska and the nation. As yet no satisfactory solution has been found. There has been a tendency on the part of many to overlook these problems. Others, on both sides, have taken a militant attitude. It seems clear, as George N. Shuster suggests, that it will not help to find the solution "to play ostrich one minute and firebrand the next."[7] With these general problems in mind, let us turn to an analysis of the manner in which Nebraskans have faced specific problems of adjusting religion and the public schools.

The practice of reading the Bible, reciting prayers, and singing hymns in the public schools has aroused considerable interest and

[5] Alexander Meiklejohn, "Educational Cooperation between Church and State," *Law and Contemporary Problems,* XIV (Winter 1949), 71.

[6] Zollmann, *American Church Law,* 82.

[7] George N. Shuster, "The Catholic Controversy," *Harper's Magazine,* CXCIX (November 1949), 32.

controversy over the nation, particularly in the last half-century. The major questions have centered around Bible reading and may be summarized briefly. First, is the Bible, or rather a particular version of the Bible, sectarian? Non-Christians might well classify it as sectarian. Jews would so consider the New Testament, while Protestants and Catholics do not accept the same versions as official. Second, does the reading of the Bible in a public school building turn the building into a place of worship, thus coercing the taxpayer into support of a religious service? Third, if attendance at Bible reading exercises is compulsory, are the constitutional provisions guaranteeing religious freedom violated?

In the nation as a whole, Bible reading in the public schools has been widely practiced. Stokes states that although no comprehensive statistics exist, "it is believed that a majority of public schools in the country still open their daily sessions with reading without comment from the Bible." Furthermore, he suggests that "a substantial minority open with a hymn and the Lord's Prayer."[8] The practice itself is partially a carry-over "from the time when present day public schools were parochial schools."[9] It may also be seen in light of the desire to promote the general moral welfare of young citizens.

Stokes points out that the first strong objection to reading the King James Bible at opening exercises came from Roman Catholics. It became for them an effective argument in favor of developing parochial schools.[10] Prior to the twentieth century only one state, Massachusetts, made the reading of the Bible in the schools obligatory. Then, in the two decades following 1913 twelve states passed statutes requiring such reading.[11]

Zollman insists that the constitutional provisions against sectarian instruction adopted by the various states in the post-Civil War period were not aimed at Bible reading. In fact, the proposed amendment to the Federal Constitution, as voted on in the Senate in 1876, stated specifically that "this article shall not be construed to prohibit the reading of the Bible in any school or institution."

The present status of Bible reading in the nation as a whole is somewhat confused. The United States Supreme Court has consistently refused to take jurisdiction because of the absence of a substantial federal question.[12] As a result, in order to get a national picture, a

[8] Stokes, *Church and State,* II, 551.
[9] Zollmann, *American Church Law,* 93.
[10] Stokes, *Church and State,* II, 549-550.
[11] *Ibid.,* 549.
[12] The most recent refusal was *Doremus v. Board of Education of Hawthorne,* 342 U. S. 429 (1952).

summary of the practice in the forty-eight states is necessary. In general, the practice in the various states falls into three categories: Bible reading required by statute or administrative order; Bible reading specifically permitted by statutes, court decisions, or administrative discretion; and Bible reading prohibited by statute or constitutional provisions as interpreted by the courts.[13] It is interesting to note that no state specifically prohibits Bible reading in the public school by statute. States which have prohibited Bible reading have done so by interpretation of such provisions as "no sectarian instruction" to include Bible reading.

Although nationwide surveys of the legal status of the practice of Bible reading in the public schools leave much to be desired, the following summary presents the general picture. The figures of the summary indicate, in the last thirty years, an interesting increase in the number of states requiring Bible reading and a slight decrease in the number prohibiting the practice. There is, however, no unanimity of practice among the states. Stokes concludes that

> most of the states now adopt one of two policies by acts of their legislatures, namely, either to forbid the use of any "sectarian" book or instruction, leaving it to the courts in any particular case to decide whether a book or instruction is sectarian; or to forbid the exclusion of the Bible on the ground that it is a sectarian book, and at the same time to prescribe the methods of its use.[14]

BIBLE READING IN THE PUBLIC SCHOOL
(Figures indicate number of states in each category)

Year	*Required*	*Permitted*	*Prohibited*	*Other*	*Total*
1922	6	6	10	26	48
1930	11	25	11	1	48
1946	12	25	8	3	48

This chart is based on the following three surveys: William R. Hood, *The Bible in the Public Schools* (Bureau of Education, Bulletin No. 15, Washington, 1923), 3. Keesecker, *Legal Status of Bible Reading and Religious Instruction in Public Schools*, 4-5. National Education Association of the United States, *The Status of Religious Education in the Public Schools* (Washington, 1949), 23.

The 1922 figure includes only "specifically" permitted. The report indicates that some of the twenty-six here classified under "other" permitted the practice.

The 1922 report listed twenty-four states as "not mentioned." These are here listed under "other."

[13] This is the classification given by Johnson and Yost, *Separation of Church and State*, 41.

[14] Stokes, *Church and State*, II, 553.

During the early history of Nebraska little evidence of controversy over the practice of reading the Bible in the public schools has been found. The Methodists, in their annual conference of 1871, passed a recommendation, for presentation to the constitutional convention of that year, which opposed legislation on the Bible in the schools.[15]

At the beginning of the present century, however, the practice of Bible reading was tested in the highest court of the state. The decision of 1902, as clarified by the court in 1903, is still the law of the state on this practice.[16] Miss Edith Beecher, a teacher in Gage County, had asked the school board for permission to hold religious exercises in the school and permission had been granted. It was her practice to pray, read the Bible, and sing gospel hymns such as "Jesus, Lover of my Soul" and "When He Cometh." Daniel Freeman, a taxpayer of the district who had children in the school, objected to such practices, and the matter was referred to William R. Jackson, the state superintendent of public instruction. Jackson replied that where sentiment in a district was unanimously in favor of such devotional exercises, there could be no question concerning prayer or reading from the Bible. Of course, he said, pupils could not be required to "conform to any religious rite or observance . . . contrary to their religious convictions or conscientious scruples." He felt that the Bible was not sectarian and he was of the opinion that "in this enlightened age and Christian land the public school teacher ought not to be deprived of reading, without . . . comment, the Bible or of repeating the Lord's prayer."

Several days before the state superintendent's opinion was written, Freeman commenced suit against the school board to prevent the religious exercises in the school. The district court held that the matter of texts used in the public schools was to be determined by the school board. Freeman then appealed his case to the Nebraska Supreme Court, where it was pointed out that Freeman's children were forced by statute to attend some school. Moreover, it was insisted that the King James Version of the Bible, which Miss Beecher had read, was different from the Roman Catholic version. Reading of the former in the school, it was claimed, was contrary to the state constitution, which provided that "no person shall be compelled to attend, erect or support any place of worship against his consent."

[15] *Report of the Constitutional Convention of 1871,* I, 504.

[16] *State, ex rel. Freeman, v. Scheve,* 65 Neb. 853 (1902), aff'd, 65 Neb. 876 (1903).

The defense argued that the department of public instruction had constantly held that the Bible might be read and the Lord's Prayer repeated in the public schools of the state. That decision, it was pointed out, had the force of law until reversed by the courts. It was also stated that some version of the Bible should be read as a masterpiece of literature. There was no objection to the Douai Version, it was said, but as literature the King James Version "is admittedly superior to the Douai version." Moreover, it was charged, the action of Freeman was not aimed at any "particular version of the Bible, but at Christianity itself—the very foundation, groundwork and cornerstone of civilization itself."

Wilbur F. Bryant and John H. Lindale filed a brief as *amici curiae* in which they called attention to the fact that an important part of the citizens of Nebraska was Roman Catholic. These people, they said, "have the same rights as other people—no more, no less." If the Bible is used and hymns are sung in the public schools and compulsory attendance is continued, then "you compel attendance at a place of worship, which is contrary to the constitution." While insisting that "the Catholic yields to no one in his reverance for the word of God," they asserted that "we do not intend to have James Stuart's translation forced down our throat without protest."[17]

Commissioner Ames wrote the opinion of the court. He pointed out that the reading of the Bible, the singing of religious hymns, and the offering of prayer were considered by the teacher, Miss Beecher, as constituting religious worship. "That they are correctly so described there can be no doubt," said the commissioner. These practices were also sectarian worship in the eyes of the commissioner. He pointed out that

> for more than three centuries it has been the boast and exultation of the Protestants and a complaint and grievance of the Roman Catholics that the various translations of the Bible, especially of the New Testament, into the vernacular of different peoples, have been the chief controversial weapons of the former and the principal cause of the undoing of the latter.[18]

The different versions and their various interpretations, he continued, "have given rise to a great number of religious sects or denominations."

[17] *Ibid.*, 862-863 (1902).
[18] *Ibid.*, 870 (1902).

The commissioner thus established his point that the practices complained of constituted sectarian religious worship. They were, then, unconstitutional under the provision providing that no one shall be "compelled to attend, erect or support any place of worship against his consent," and the provision prohibiting sectarian instruction in state-supported schools. To support his conclusion, he referred to a decision of the Wisconsin Supreme Court in a similar case.[19] That court's discussion, he said, is "a thorough review of both the legal principles involved, and of the historical aspects of the controversy." In addition, "for the most part, and in essential particulars [it] voices our own views." He then went on to comment that

> if the system of compulsory education is persevered in, and religious worship or sectarian instruction in the public schools is at the same time permitted, parents will be compelled to expose their children to what they deem spiritual contamination, or else, while bearing their share of the burden for the support of public education, provide the means from their own pockets for the training of their offspring elsewhere.

Either alternative, he felt, "besides being unjust and oppressive" would tend to multiply parochial and sectarian schools and thus

> tend forcibly to the destruction of one of the most important, if not indispensable, foundation stones of our form of government. It will be an evil day when anything happens to lower the public schools in popular esteem, or to discourage attendance upon them by children of any class.[20]

The court was not completely of one mind. In a brief concurring opinion Justice Sedgwick agreed with the decision "solely on the ground that the exercises complained of were 'sectarian instruction' within the meaning of the constitution."[21] Justice Holcomb wrote a lengthy concurring opinion in which he took the same stand as Justice Sedgwick but more fully developed his reasons. He was of the opinion that the practices complained of by Freeman did not convert the schoolhouse into a place of worship "within the meaning and contrary to the section of the constitution" which ordered that "no person shall be compelled to attend, erect or support any place of worship against his consent." Such an interpretation, he feared, would prevent religious exercises in any state penal, reformatory, or eleemosynary

[19] *State ex rel. Weiss and others v. District Board, etc.*, 76 Wis. 177 (1890).
[20] *State, ex rel. Freeman, v. Scheve*, 65 Neb. 853, 872 (1902).
[21] *Ibid.*, 874.

institutions and would prohibit the legislative use of chaplains. He also made it clear that he did not feel that the Bible was a sectarian book. He pointed out, in fact, that he did not

> wish to be understood as holding to the view that it is not within the discretionary power of the authorities of school districts to sanction, if deemed wise, under proper restrictions, the reading of the Bible or portions thereof, or reading therefrom, in the public schools.[22]

He pointed to the historical, literary, and moral values of the Bible and suggested that had the framers of the constitution intended to exclude the Bible from the schools they would "have expressed themselves in such language as could not be misunderstood." In any case, he concluded, the court was not warranted in going farther than eliminating from the schools "those theological doctrines and beliefs which are peculiar to some only of the different religious sects."[23]

Encouraged by the apparent difference of opinion in the court itself and by a resolution passed by the churches of Beatrice in opposition to the decision, Attorney E. O. Kretsinger filed a brief asking for a rehearing by the supreme court.[24]

In January, 1903, the request for a rehearing was denied, but Chief Justice Sullivan took the opportunity thus offered to clarify the court's position on the Bible reading issue. He insisted that "the suggestion that it is the duty of government to teach religion has no basis whatever in the constitution or laws of this state, nor the history of our people." Teaching of religion, he claimed, "would mean sectarianism in the public schools" which would, "according to the opinion prevailing when the constitution was ratified, be to put venom into the body politic." The whole duty of the state with respect to all religions, he said, was "to protect every religious denomination in the peaceable enjoyment of its own mode of public worship." The "natural and indefeasible" constitutional right of all to worship according to the dictates of their consciences, he felt, was violated by compelling the children of Freeman to attend divine worship. It is true, Justice Sullivan continued, that the teacher was a

> sincere and well-meaning young woman, and was actuated by the purest and best motives, but in discharging what she con-

[22] *Ibid.*, 875.
[23] *Ibid.*, 876.
[24] *The Nebraska Blue Book 1915*, 113.

> ceived to be an imperative duty to her Creator, she violated a right secured to the relator by the supreme law of the state.[25]

The justice pointed out that while it was denied that the children had been subjected to compulsion, "that is not true" for it was their duty to attend school under the law and the religious services were conducted during school hours. "It is difficult," he said, "to see how they could attend the school without attending worship." Moreover, they were compelled to participate by standing during prayer. He pointed out that it was immaterial whether Freeman was reasonable or unreasonable in objecting to participation by his children in the simple religious service, for "some men always have been unreasonable in such matters, and their right to continue to be unreasonable is guaranteed by the constitution and characterized as a natural and indefeasible right." While upholding the decision written by Commissioner Ames that the morning exercises conducted by Miss Beecher constituted sectarian instruction, he insisted that

> the decision does not, however, go to the extent of entirely excluding the Bible from the public schools. It goes only to the extent of denying the right to use it for the purpose of imparting sectarian instruction. The pith of the opinion is in the syllabus, which declares that "Exercises by a teacher in a public school in a school building, in school hours and in the presence of the pupils, consisting of the reading of passages from the Bible, and in the singing of songs and hymns, and offering prayer to the Diety in accordance with the doctrines, beliefs, customs or usages of sectarian churches or religious organizations, is [*sic*] forbidden by the constitution of this state."[26]

After stating that the *Iliad* might be read without inculcating a belief in Olympic dieties and the Koran might be read without indoctrinating children, he asked why the Bible might not also be read without indoctrination. He then outlined the historical, moral and literary qualities of the Bible. Moreover, he asserted,

> the fact that the King James translation may be used to inculcate sectarian doctrines affords no presumption that it will be so used. The law does not forbid the use of the Bible in either version in the public schools; it is not proscribed either by the constitution or the statutes, and the courts have no right to declare its use to be unlawful because it is possible or probable

[25] *State, ex rel. Freeman, v. Scheve,* 65 Neb. 853 (1902), aff'd, 65 Neb. 876, 879 (1903).

[26] *Ibid.,* 882-883.

> that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions. The point where the courts may rightfully intervene, and where they should intervene without hesitation, is where legitimate use has degenerated into abuse,—where a teacher employed to give secular instruction has violated the constitution by becoming a sectarian propagandist.

He stated bluntly that the court did not wish to be understood as either countenancing or discountenancing Bible reading in the schools. The nonsectarian provision of the constitution, he stated,

> cannot, under any canon of construction with which we are acquainted, be held to mean that neither the Bible, nor any part of it, from Genesis to the Revelation, may be read in the educational institutions fostered by the state.

"Whether it is prudent or politic" to allow Bible reading in the public schools should be decided by the school authorities. On the other hand, in a particular case, whether such Bible reading has become sectarian "is a question for the courts to determine upon evidence."[27]

Thus, the *Scheve* case, which at first appeared to be and often is cited as an example of the prohibition of Bible reading in the schools,[28] actually denies that the King James Bible is necessarily sectarian and puts its stamp of approval on Bible reading provided it is done in a nonsectarian manner. It is true, however, that no definite rules were established to clarify the point at which Bible reading becomes sectarian and is therefore prohibited. No other case on Bible reading has reached the Nebraska Supreme Court; so the law stands as interpreted in 1903.

The *Scheve* case did not settle the question of Bible reading in the public schools to the satisfaction of all groups. In fact, much interest has been shown in the matter over the years. In the period during and immediately following World War I, the journals of the legislature indicate considerable interest in an attempt to require Bible reading in the public schools. On February 2, 1915, it is recorded in the house journal that Dr. Wilbur F. Crafts of Washington, D. C., was granted fifteen minutes to address the house on the subject of Bible study in the public schools. The record does not reveal his stand on the matter.[29] Petitions were received by both houses from groups favoring re-

[27] *Ibid.*, 884.
[28] For example, see Torpey, *Judicial Doctrines of Religious Rights*, 247.
[29] *H. J. 1915*, 185.

quired Bible reading. In 1919 a senate bill was introduced to require "all teachers in all public schools" each morning "to read or recite in concert with the pupils the Lord's prayer" and "read or cause to be read" at least five verses from the Bible without comment. In lieu of the above, the teacher was to be permitted to "read or cause to be read the Ten Commandments, the 23rd Psalm or some of the Proverbs." The bill provided that the reading was to be done in an "audible voice that can be clearly heard in all parts of the public school room occupied by the pupils." The committee on education recommended that the bill be indefinitely postponed and the senate followed the recommendation.[30]

The constitutional convention of 1919-1920 was also forced to deal with the problem. It was proposed that article VIII, section 11, of the constitution be amended by adding the following:

> Provided that nothing in this section shall be construed to prohibit the daily reading of the Bible in the public schools for such non-sectarian teaching of the principles of morality as may be provided by the Department of Public Education.[31]

A motion to postpone the proposal indefinitely precipitated a heated debate. Those who opposed the amendment pointed out that the Bible taught tolerance and that it was intolerant to force doctrines upon other people. Although the provision did not compel Bible reading in the public schools, it was asserted, "you do not have to force the majority to do anything . . . . It is the minority that needs protection." Moreover, it was suggested, there are different versions of the Bible upon which there is no general agreement. Thus, the reading of a particular version was a religious ceremony and hence sectarian. If it is read merely as a textbook, said the opposition, it can have little moral influence. Those who supported the measure insisted that they would not force the Bible on the public schools. They merely wanted to save it from exclusion. They asserted that not only did the Bible have value as a moral guide but it also had great literary and historical merit. One speaker stated that it was his belief "that we are not indifferent to the fact that this is a Christian country." Another pointed out that the Bible was the "foundation of the spiritual faith of almost every man in this country, be he Jew or Gentile, be he Catholic or Protestant, or be he Mormon." The same speaker insisted that lack of knowledge of the Bible was widespread "all over this

[30] *S. J. 1919,* 963.
[31] *Journal of the Nebraska Constitutional Convention of 1919-1920,* I, 335.

land." The Nebraska legislature, he insisted, had already repealed a part of the Ten Commandments by passage of the Sunday baseball law. "I wonder," he continued, "if ever, in the history of the world, we needed the Bible and the principles of the Bible as we need them today." When the vote was taken on the motion to postpone the measure indefinitely, it carried by 48 to 34. A number of members then felt it necessary to explain their vote in the record. Reasons given for opposition ranged from the belief that the proposal violated the proviso against sectarian instruction and the belief that it raised an unpleasant question, to the belief that since the situation then existing permitted Bible reading, it would continue to be permitted. Others felt that such matters should be left to the local school board and should not be included in the constitution.[32]

During the next few years the attorney general of the state was asked several times to give his opinion as to the legality of Bible reading in the public schools. Each time he indicated that reading of the Bible without comment was not prohibited.[33]

Johnson and Yost report that in answer to a questionnaire dated November 1, 1932, the state superintendent of public instruction remarked that no records of Bible reading in Nebraska schools were kept but that it was assumed that very few schools carried on the practice. One might conclude, then, that in recent years the Bible reading problem has not been serious in Nebraska and that Nebraska, in permitting, but not requiring, the reading of the Bible in the public schools, has followed the lead of the majority of the states. The Nebraska arrangement really results in local option.

Closely related to Bible reading has been agitation for the introduction of Bible instruction into the public schools for which credit would be offered. In 1917 a bill which had as its purpose the encouragement of such courses died in committee.[34] Attorney General Davis advised the state superintendent of public instruction in 1922 that while he felt that students might not be excused from school to receive religious instruction, "Bible study in the public schools is a different proposition." He pointed out that the Bible had literary, historical and philosophical content "entirely apart from the religious aspect." "Probably," he said, "a school board could establish a course of Bible study and give credit for the same as a part of the school curriculum."[35]

[32] *Ibid.*, 1125.

[33] See, for example, *Rep. Att'y Gen. 1922,* 353-357; *Rep. Att'y Gen. 1924,* 603-605; and *Rep. Att'y Gen. 1926,* 299.

[34] *S. F.* 327 (1917).

[35] *Rep. Att'y Gen. 1922,* 358.

Also closely related to the Bible reading problem is the question of whether or not a public school may purchase or possess Bibles for its library. This matter has not appeared as a legal problem in Nebraska. According to officials in the state department of public instruction, some public schools purchase Bibles. The Gideons have also been permitted to place Bibles in Nebraska school libraries.

The use of public school property by religious groups has been widely practiced in various states, particularly in sparsely settled areas. As a result, the practice has been a matter of controversy and state regulations differ considerably.[36] While no state recognizes the *right* of citizens to use publicly owned schoolhouses for purposes other than educational, it is permitted in some as a privilege.[37] Permission is based upon the reasoning that such use adds to the moral tone of the community; that it is the preferential treatment of sects by the state which is prohibited and so care must be taken only to ensure that school buildings are equally available to all sects; that while the state must protect education, it should not reduce its protection to an absurdity by prohibiting that which will in no way affect education; and that any additional cost to the taxpayer is negligible. On the other hand, some states have prohibited the practice because it might prejudice the state educational program and because it contributes to the wear and tear on the building. The latter would increase the cost of maintenance and force the taxpayer to contribute to religion contrary to constitutional and statutory provisions.[38] Many states have provisions similar to that of Nebraska which prohibit anyone from being "compelled to attend, erect or support any place of worship against his consent." While the general rule would seem to be that the proper authorities may permit the use of schools for religious purposes as long as such use is reasonable and proper, there is no settled judicial principle on the matter.[39]

The extent to which public schoolhouses might be used for religious services has at times posed interesting problems in Nebraska. In the *Scheve* case the question was discussed as to whether Bible reading in the public school building turned such a building into a place of worship as prohibited by the constitution. The opinion of Commissioner Ames implied that it did and he based a portion of his decision on the constitutional provision that "no person shall be com-

[36] Stokes, *Church and State,* II, 584.

[37] James E. Harpster, "Religion, Education and the Law," *Marquette Law Review,* XXXVI (1952-1953), 41.

[38] *Ibid.,* 40-41.

[39] Torpey, *Judicial Doctrines of Religious Rights,* 262.

pelled to attend, erect or support any place of worship against his consent." Chief Justice Sullivan did not mention this point in his clarification of the court's stand on the matter.

Since territorial days the use of schoolhouses for actual religious services has been widespread in Nebraska. As late as 1939 the supreme court stated that

> it is common knowledge that many church organizations have existed in Nebraska throughout the entire period of our history, holding their services in homes, schoolhouses, and quite often in church buildings owned by other denominations.[40]

The legality of the use of public school buildings by religious groups was not tested before the highest court of the state until 1914.[41] In 1911 a petition was filed in district court against Dilley and other school board members of District Thirteen in Saline County. The petition had as its purpose the forcing of the school board "to keep the schoolhouse in that district closed to the public as a place of worship on the first day of the week, commonly called Sunday, and on other days." It was charged that by permitting use of the schoolhouse for religious services, the board had converted the building into a place of worship and had compelled the petitioners to support religion against their consent. This compulsory support, it was claimed, was contrary to the constitution. Dilley and his fellow board members admitted permitting the school building to be used for religious services. They contended in defense of their action that, when the schoolhouse was built, it had been agreed that it would be used occasionally for religious meetings; that during the past five years there had not been more than five religious meetings per year; that such meetings had not interfered with school functions; that any expense occasioned by such meetings had been borne by those participating in the meeting; and that the meetings had not been sectarian in nature. Thus, they concluded, the schoolhouse had not been turned into a place of worship contrary to the constitution. Moreover, the petitioners had not "been compelled to contribute . . . anything of value whatsoever to the purpose of maintaining the schoolhouse as a place of worship." The district court refused to prohibit such infrequent religious meetings in the public schoolhouse.

The case was appealed to the Nebraska Supreme Court. Justice Barnes delivered the opinion of the court. He reviewed the facts and

[40] *In re Application of Tyler,* 135 Neb. 667, 678 (1939).
[41] *State, ex rel. Gilbert, v. Dilley,* 95 Neb. 527 (1914).

concluded that religious meetings which did not interfere with school work, which were held not more than four times a year, and which no one was compelled to attend, did not convert the schoolhouse into a place of worship. He also pointed out that those opposed to the use of the school for religious meetings had "failed to show that they had been compelled to pay any sum whatever for the support of the meetings in question, or for the repair of the schoolhouse occasioned by such meetings." Therefore, they had not brought "themselves within the inhibition of the constitutional provisions" prohibiting compulsory support of any place of worship. He confirmed the judgment of the district court.[42] Justice Hamer, who concurred, insisted that "to impart knowledge concerning religion and religious subjects is educational to the extent that our civilization covers and includes those subjects." "The discussion of religion," he felt, "and its relation to our civilization ought to be educational and beneficial."[43]

In the following year, 1915, two bills were introduced into the legislature to provide for the use of schoolhouses as social centers. The house bill provided specifically for the use of the schoolhouses for religious as well as educational, social, political and fraternal purposes. The senate bill, which became law, provided that the school boards of districts in villages and cities might in their "discretion permit the use of public school buildings for public assemblages under such rules" as they might adopt. In rural districts a majority of the electors might permit similar use of school buildings under rules prescribed by the board. Provision was made in both cases for setting up a rental charge.[44]

In 1922 this statute was tested before the state supreme court. The test case did not involve the use of a school building for religious meetings. Rather, the problem was that of the legality of holding supervised dances in a public schoolhouse in North Platte. The court stated that the statute of 1915 "fully covered" the case and gave the board of education of a city school district the power to "permit use of public school buildings for public assemblages." It was suggested that the board, which dealt "with people of every creed, belief and denomination knew of no way of handling any of these problems except by using its own best judgment."[45]

The attorney general voiced his opinion later in 1922 that a city school board might permit the American Legion to use the school

[42] *Ibid.*, 531.
[43] *Ibid.*, 532.
[44] *Laws 1915*, c. 236.
[45] *Brooks v. Elder*, 108 Neb. 761, 764 (1922).

auditorium.[46] Eight years later the attorney general stated that in spite of the statute, the constitutional provisions would govern "in a case where it might be shown that religious meetings if frequently conducted and without full financial compensation to the school district make of school premises 'a place of worship.' " He pointed out, however, that if adequate rental were paid for the use of school buildings for religious meetings "it would be very difficult to set up any legal objection . . . having in mind the well-recognized modern tendency to open school premises to all sorts of public uses."[47]

The statute of 1915 was not amended until 1949,[48] when rural school boards, as well as city and village boards, were given complete jurisdiction over the use of school buildings. The current statute reads as follows:

> The school board or board of education of every school district may in its discretion permit the use of public school buildings for public assemblages under such rules and regulations as it may adopt. The school board or board of education may exact such rental as may be necessary to meet the expense of such meeting, restore the property, and pay for extra help required.[49]

It would seem fair to conclude that, in Nebraska, public school buildings may be used, within reasonable limits, for religious meetings. Here, as with the practice of Bible reading, the matter has been left to local option with the possibility of court review.

The question of whether or not members of Catholic teaching orders may wear their religious garb while teaching in the public schools has resulted in considerable debate at times and has been the subject of litigation and specific legislation in some states. The legal question involved in the controversy is whether or not the wearing of such garb offends constitutional provisions prohibiting sectarian instruction or control of public schools by sectarian groups.

Those who oppose the wearing of religious garb by teachers in the public schools point out that such garb inspires respect and as such is at least sectarian influence if not actually sectarian instruction. Stokes suggests prohibition of such garb is "a reasonable attempt to prevent the identification of a public school with any one religious

[46] *Rep. Att'y Gen. 1922,* 352-353.
[47] *Rep. Att'y Gen. 1930,* 361.
[48] *Laws 1949,* c. 256.
[49] *R. R. S. 1943,* sec. 79-4,142.

body."[50] It is charged, also, that such a practice puts control of public education in the hands of those committed to a particular religious doctrine. Moreover, it is common knowledge that the salaries of members of teaching orders are turned over to the orders. Thus, it is claimed, the payment of salaries to members of such orders violates constitutional provisions prohibiting the giving of public money to support religious groups.

Those who favor permitting garbed teachers in the public schools point out that while the garb may inspire respect for the religion of the teacher, the religion of a teacher is not a secret and such respect might well result regardless of the garb. Moreover, since most people have some convictions about religion, the hiring of anyone would throw control of the school into the hands of those professing adherence to some religious belief. However, mere employment does not mean control. To eliminate teachers because of adherence to religious beliefs would be absurd and would be a clear discrimination against teachers because of their religion. This is specifically prohibited in some states by statute.[51] In addition, the disposition of the teacher's salary is not normally subject to the control of the state even though a large portion of it may be given to a religious organization.

With the wearing of religious garb, as with the other matters discussed earlier in this chapter, the practice of the various states is not uniform. In approximately fifteen states nuns wearing religious garb are employed as public school teachers.[52] At least twenty states, on the other hand, prohibit the practice and Torpey points out that "legislatures apparently enjoy a wide range of discretion in this question."[53]

Immediately after World War I, as a part of the postwar anti-foreign, anti-Catholic movement usually associated with the Ku Klux Klan, the Nebraska legislature enacted a law which read as follows:

> Any teacher in any public school in this state who shall wear in said school or while engaged in the performance of his or her duty any dress, or garb, indicating the fact that such teacher is a member or an adherent of any religious order, sect or denomination, shall upon conviction thereof, be deemed guilty of a misdemeanor and fined in any sum not exceeding one hundred ($100) dollars and the costs of prosecution or shall be

[50] *Church and State,* II, 590.

[51] Harpster, "Religion, Education and the Law," *Marquette Law Review,* XXXVI (1952-1953), 55.

[52] Stokes, *Church and State,* II, 590.

[53] *Judicial Doctrines of Religious Rights,* 260.

committeed to the county jail for a period not exceeding thirty days or both.[54]

The same act provided that school board members should suspend violators on the first offense and permanently disqualify them in the event of a second offense. If the board members failed to comply with the law, they were declared guilty of a misdemeanor and subject to fine.

This Nebraska statute prohibiting the wearing of religious garb by teachers in the public schools has not been tested before the supreme court. In 1926, however, the attorney general was faced with an interesting problem. Several Catholic sisters had completed their work at Kearney State Normal School but needed ten hours of practice teaching. Was it possible under the statute to receive their training in the public schools? The attorney general answered the question as follows:

> I am of the opinion that the word "teacher" as used in the . . . statute applies only to those who hold certificates to teach in Nebraska and are employed to teach in some of the public schools of the state. I do not think it applies to those who are merely being trained to teach in some one of the several state normal schools, and as an incident to said training, but without compensation are giving instruction (under the direct supervision of a member of the faculty of a state normal school) for short periods of time to pupils in a public school of the state.[55]

After several unsuccessful attempts the Nebraska legislature passed a statute in 1937 aimed at protecting teachers from religious discrimination. It provides that

> it shall hereafter be unlawful for any person to prepare or deliver any questionnaire, employment application, or information blank to any applicant for any teaching position in the public schools of this state, if said questionnaire, employment application or information blank shall contain any inquiry or reference to the religious affiliation or the religious belief of said applicant.[56]

The barring of garbed teachers from the Nebraska public schools essentially results in the barring of members of Catholic teaching

[54] *Laws 1919,* c. 248.
[55] *Rep. Att'y Gen. 1926,* 303.
[56] *Laws 1937,* c. 180. See also *R. R. S. 1943,* sec. 79-1268.

orders. Thus, from one point of view, prohibition of garbed teachers violates in principle, at least, the statute of 1937 which tried to prohibit religious discrimination among applicants for teaching positions. On the other hand, the seeming incongruity might be resolved by holding that the statute does not interfere with religious belief but rather is directed against the act of wearing religious garb.

Since 1919, then, it has been illegal under Nebraska law for religious garb to be worn by teachers employed in public schools. While this position might be interpreted as violating religious freedom, it follows the practice in many other states.

The question of whether or not pupils may be released from classes in the public schools for religious instruction constitutes the "released-time" problem. The nationwide controversy over this practice has in recent years overshadowed all others involving the relationship of religion to the public schools.

The amazing development in the nineteenth century of the compulsory nonsectarian public school placed parents, churches, and citizens in general in a desperate dilemma. It has been said that

> on one side, they recognized that no one sectarian faith could be taught to all pupils in the public schools. On the other side, they saw that teaching which is given without what is here called "spiritual" grounding is, of necessity, inadequate and ill-motivated. Its structure is that of a house without foundations.[57]

One solution offered to this dilemma was that homes and churches should supplement the work of the schools. However, "the brutal fact must be faced that homes and churches, working against terrible odds, have had little success in their part of the teaching."[58] In recognition of this failure, some states, such as California, Florida, Idaho, Indiana, Maryland, Massachusetts, Mississippi, Nebraska, Oregon, and South Carolina, have passed laws requiring instruction in good behavior and morals in the public schools.

Another approach to the dilemma has been that of providing some kind of a weekday church school to supplement the public school. These weekday church schools vary greatly. Essentially, however, they fall into three categories, known as "free time," "dismissed time" and "released time." "Free time" applies to church schools conducted outside of regular school hours. "Dismissed-time" church schools are

[57] Meiklejohn, "Educational Cooperation between Church and State," *Law and Contemporary Problems*, XIV (Winter 1949), 65.

[58] *Ibid.*

conducted during the regular school day, but school is dismissed during that time and students may elect to attend such schools or to go elsewhere. "Released-time" church schools are also held during the regular school day, but only those students desiring to attend church school classes are "released." The other students remain and attend regular classes.[59] Of these various arrangements, it is only the "released-time" program which has run into serious legal difficulties.

Those who oppose released-time programs insist that the compulsory attendance statutes are violated if students are released to attend religious classes. Such classes take time which should be devoted to regular school work. If such religious instruction is desired, they claim, it should be offered at times which do not conflict with the established public school day. Moreover, the opponents insist, the state, through its compulsory attendance laws, is really aiding the various sects because it provides pupils for the religious classes. In addition, the participation of public school teachers and administrators and the use of public school facilities in aiding the organization and functioning of such church schools involves unlawful expenditure of state funds. Finally, the division of pupils on the basis of religion embarrasses those who do not participate and opens the door for all kinds of intolerance and bigotry.

Those who favor released time insist that while school attendance is compulsory, it is within the power of school authorities to release students from certain activities. Attendance at church schools is optional, they point out, and therefore the state is not aiding the various sects by providing students through its compulsory machinery. Moreover, not all aid to religion is wrong per se and what aid may be given by the services of teachers and administrators or by use of public school facilities is trifling. Finally, they say, embarrassment need not result for those who are not released to go to the church school classes. In any case, since children are brutally frank, the public school could hardly set as one of its goals the prevention of embarrassment for all.

Prior to the decision in the *McCollum* case, released-time programs in the public schools were very popular. The program apparently took its start in Gary, Indiana, in 1913 and spread rapidly all over the United States.[60] Minnesota and South Dakota in 1923 and Iowa and Oregon in 1925 specifically permitted by statute the use of public school time for religious instruction. It was authorized in other states

[59] Russell N. Sullivan, "Religious Education in the Schools," *Law and Contemporary Problems,* XIV (Winter 1949), 93.

[60] Lucille B. Milner, "Church, State, and Schools," *New Republic,* CXIII (1945), 179.

by favorable rulings of the state department of education or by the attorney general.[61] To church leaders such arrangements are attractive because religious instruction becomes a regular matter and is not subject to competing activities. By the time of the *McCollum* decision, then, such programs were in operation in 2,200 communities in 46 states.[62] It is to be noted that there is a discrepancy between these figures and those given in the National Education Association report of 1946, which showed that there was no such program in 13 states, that it existed in 33 states, and that information was not available for 2 states.[63] The apparent discrepancy may result from a confusion of "dismissed time" and "released time."

Although cases involving released time are few, the matter has come before some state courts. Best known are the New York cases. In 1925 a New York court decided by a narrow interpretation of the education law that the released-time program was illegal because the law required that "every child . . . attend upon instruction for the *entire time* during which the schools were in session." The court also pointed out that churches for all pupils were not readily available and that those who were excused might fall behind in their regular school work. At any event, the court maintained, there were only 180 days of school a year which left 185 days for religious instruction. Another point which the court decided was that the very fact that the teachers were required to help administer the program by checking release cards and attendance resulted in the teachers diverting "their attention from other necessary work, and indirectly imposed expense upon the school board for the purpose."[64] Public funds, therefore, were being used to aid in religious and sectarian purposes. A new case involving the same issue came before the Appellate Division of the Supreme Court of New York in 1927. It reversed the ruling in *Stein v. Brown* and stated its point of view as follows:

> The state by its educational policy seeks to build from its youth useful citizens of intelligence and character, not merely pedants and philosophers. In following this policy it should not only consider the wishes, but invite the aid, of parents. When the wish of parents for weekday religious instruction for their children involves no serious interruption to school attendance, the state can have no purpose to defeat it. If local school

[61] Richard J. Gabel, *Public Funds for Church and Private Schools* (Washington, 1937), 555.

[62] *Ill. ex rel. McCollum v. Board of Education,* 333 U. S. 203, 224 (1948).

[63] *The Status of Religious Education in the Public Schools,* 23.

[64] *Stein v. Brown,* 211 N. Y. S. 822, 827 (1925).

> authorities render their assistance by methods so innocuous as those detailed here, it does not amount to illegality . . . . Neither the local school officers nor the commissioner of education have here violated that rule.[65]

In 1948 the Supreme Court of the United States reviewed the released-time program of the Champaign, Illinois, public schools.[66] There the board of education had given permission to the religious groups of the community to hold religious education classes for thirty minutes each week in the school buildings. Classes were provided in three separate religious groups for Protestants, Catholics, and Jews. Mrs. Vashti McCollum, who had a child in the Champaign schools and who claimed to be an atheist, asked that the board of education be ordered to discontinue the released-time program. She insisted that her religious freedom, guaranteed by the First Amendment as applied to the states by the Fourteenth Amendment, was infringed. The United States Supreme Court with only one dissenting member decided that the Champaign released-time program was unconstitutional. Although "the precise basis for the result is impossible to determine,"[67] great emphasis was placed upon the use of the public school buildings for the religious classes and upon the claim that the state's compulsory education law was being used to recruit pupils for religious classes. This suggestion has broad implications for parochial schools.

Two results of the *McCollum* decision were almost immediately noticeable. In the first place, a number of schools discontinued or revised their released-time programs. Since, however, the *McCollum* case was concerned with a particular set of facts, released-time programs continued in New York, Indiana, Maine, South Carolina, New Jersey and Virginia. Some large cities such as New York, Chicago, Cincinnati, Dayton, Toledo, Indianapolis, Boston, Pittsburgh, Minneapolis, St. Paul, Spokane, and Los Angeles also continued their programs. These were continued on the assumption that "the *McCollum* case only outlawed plans which make use of school buildings, school funds for the printing of cards, or the 'machinery of operation' of the school system."[68] In the second place, the *McCollum* decision aroused a storm of protest especially from legal and religious groups. The eminent constitutional scholar, Edwin S. Corwin, summed up the legal criticism of the decision as follows:

[65] *People ex rel. Lewis v. Graves,* 219 N. Y. S. 189, 196 (1927).

[66] *Ill. ex rel. McCollum v. Board of Education,* 333 U. S. 203 (1948).

[67] Sullivan, "Religious Education in the Schools," *Law and Contemporary Problems,* XIV (Winter 1949), 100.

[68] *Ibid.,* 110.

> In the first place, the justification for the Court's intervention was trivial and directly violative of restrictions hitherto existing on judicial review. In the second place, the decision is based, as Justice Reed rightly contends, on "a figure of speech," the concept of "a wall of separation between Church and State." Thirdly, leaving this figure of speech to one side, the decision is seen to stem from an unhistorical conception of what is meant by "an establishment of religion" in the First Amendment. The historical record shows beyond peradventure that the core idea of "an establishment of religion" comprises the idea of *preference;* and that any act of public authority favorable to religion in general cannot, without manifest falsification of history, be brought under the ban of that phrase. Undoubtedly the Court has the right to make history, as it has often done in the past; but it has no right to *remake* it. In the fourth place, the prohibition on the establishment of religion by Congress is not convertible into a similar prohibition on the states, under the authorization of the Fourteenth Amendment, unless the term "establishment of religion" be given an application which carries with it invasion of somebody's freedom of religion, that is, of "liberty." Finally, the decision is accompanied by opinions and by a mandate which together have created great uncertainty in the minds of governing bodies of all public educational institutions.[69]

The Catholic bishops of the United States expressed the following opinion on the *McCollum* decision:

> The opinion of the court advances no reason for disregarding the mind of the legislature. But that reason is discernible in a concurring opinion adhered to by four of the nine judges. There we see clearly the determining influence of secularist theories of public education—and possibly of law. One cannot help remarking that, if this secularist influence is to prevail in our government and its institutions, such a result should in candor and logic and law be achieved by legislation adopted after full popular discussion, and not by the judicial procedure of an ideological interpretation of our Constitution.[70]

In 1952 the released-time program of New York City was tested before the United States Supreme Court. In an opinion written by Justice Douglas, six members of the court distinguished the New York program from that considered in the *McCollum* case because public school buildings were not used and there was lack of evidence of coer-

[69] "The Supreme Court as National School Board," *Law and Contemporary Problems,* XIV (Winter 1949), 20-21.

[70] As quoted in Harpster, "Religion, Education and the Law," *Marquette Law Review,* XXXVI (1952-1953), 54.

cion to get pupils into religious courses. Justice Douglas pointed out that "the First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State." If that were so, said he, "the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly." Moreover, "we are a religious people whose institutions presuppose a Supreme Being." The encouragement of religious instruction and cooperation by the state "with religious authorities by adjusting the schedule of public events to sectarian needs" results in following "the best of our traditions." Not to do so would really be "preferring those who believe in no religion over those who do believe." While the state "may not coerce anyone to attend church . . . or to take religious instruction," he concluded, "it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here."[71] Justices Jackson, Frankfurter, and Black wrote vigorous dissents, insisting that as in the *McCollum* case, the compulsory school laws provided coercion. The sole question for determination, said Justice Black, was "whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery."[72]

Although released time has posed serious legal problems elsewhere, its validity has apparently not been a serious legal question in Nebraska. Various types of dismissed and released-time provisions have been used in Nebraska. In 1922 the attorney general expressed his opinion on a released-time plan. He pointed out that the compulsory school law required children to "attend school regularly for the entire time in which the schools are in session." Therefore, he felt that the school board had "really no authority to excuse certain children from school at definite periods to receive religious instruction in churches."[73]

In 1945 several churches in Hebron, Nebraska, wished to set aside one hour a week during regular school time when pupils might be excused to attend classes in religious training at their churches. Those who did not attend the classes were to remain in school. Progress in the religious studies was to be noted on the regular report cards. The attorney general indicated that the giving of credit for sectarian instruction violated the constitutional provision which prohibited sectarian instruction. Moreover, he felt that the plan discriminated against those students who did not wish to attend the religious classes

[71] *Zorach v. Clauson*, 343 U. S. 306, 312-314 (1952).
[72] *Ibid.*, 318.
[73] *Rep. Att'y Gen. 1922*, 358.

and were thus required to remain in school. The plan prepared by the office of the superintendent of public instruction, he stated, correctly reflected the law. This plan encouraged participation in church activities outside of school hours and discouraged the granting of school credit for such activities.[74]

At the present time officials in the state superintendent's office state that there is no such thing as released time in Nebraska and that such a program would be considered illegal. They state further that there is nothing to prohibit a school district from inaugurating a dismissed-time program so long as the time requirements of the Nebraska course of study are observed. Although no records are maintained, it was the opinion of the same officials that such programs are not common in Nebraska.

It would appear that according to the opinion of the attorney general and the ruling of the state superintendent of public instruction, released-time programs are illegal and nonexistent in Nebraska. It is to be noted, however, that the state supreme court has never passed on the issue and in light of the *Zorach* decision might well consider legal a program similar to that of New York City.

An apparent lack of interest in Nebraska in released-time programs does not mean that Nebraskans have been uninterested in providing moral instruction for their children. The provision of such instruction was the intent of a statute originally passed in 1927, but since amended, which provides:

> Each teacher employed to give instruction in any public, private, parochial, or denomintional school in the State of Nebraska shall so arrange and present his instruction as to give special emphasis to common honesty, morality, courtesy, obedience to law, respect for the national flag, the Constitution of the United States, and the Constitution of the State of Nebraska, respect for parents and the home, the dignity and necessity of honest labor, and other lessons of a steadying influence which tend to promote and develop an upright and desirable citizenry.[75]

Several problems involving religion and the public schools, which have aroused considerable controversy elsewhere, have been of only minor importance in Nebraska. One such problem concerns compulsory physical examination and immunization for public school children. Some religious sects object to such practices. Hence, in 1923,

[74] *Rep. Att'y Gen. 1946,* 218-220.
[75] *R. R. S. 1943,* sec. 79-214.

the statute providing for physical examination of pupils was amended to provide that

> no child shall be compelled to submit to a physical examination by other than the teacher, over the written objection of his parent or guardian, delivered to the child's teacher, provided, however, that such objection shall not exempt the child from the quarantine laws of the state nor prohibit an examination for infectious or contagious diseases.[76]

In 1950 the attorney general delivered an opinion on compulsory vaccination. He was asked if a board of education could legally require every pupil, except those whose parents objected for religious reasons, to present proof of vaccination for smallpox and immunization against diphtheria. He stated that if a school board felt vaccination of the children under its supervision was necessary in the interest of public health, exceptions could not be made legally on religious grounds.[77] This opinion of the attorney general would seem to be in line with decisions of courts in other states faced with similar problems. Torpey remarks that "courts have unanimously denied to the parents relief" from complying with compulsory vaccination requirements for their school-attending children "unless the law contained an express exemption."[78]

Another problem which has aroused nationwide interest is that of compulsory flag salute. About one-fourth of the states require pupils to salute the flag or to have flag exercises in the public schools.[79] During World War II considerable feeling was aroused in various parts of the nation by the refusal of members of Jehovah's Witnesses to comply with these statutes because of religious scruples.

Under the provisions of the Nebraska statutes the state superintendent of public instruction had required that "in every school there must be a program providing for a salute to the flag."[80] Verna Lee Anderson was expelled from school for failure to salute the flag. She petitioned for reinstatement and in 1942 the attorney general was asked for an opinion on the matter. He made extensive quotations from the recent United States Supreme Court decision[81] in which it had been held that the requirement of a salute to the flag did not violate

[76] *Laws 1923,* c. 55. For the current statute see *R. R. S. 1943,* sec. 79-4,133.
[77] *Rep. Att'y Gen. 1950,* 900-902.
[78] *Judicial Doctrines of Religious Rights,* 268-269.
[79] Johnson and Yost, *Separation of Church and State,* 175.
[80] *Rep. Att'y Gen. 1942,* 401-403.
[81] *Minersville School District v. Gobitis,* 310 U. S. 586 (1940).

constitutional rights. The attorney general then pointed out that the Nebraska situation was almost exactly parallel to that in the federal case. In 1943, however, the United States Supreme Court reversed itself.[82] The state superintendent of public instruction followed the ruling of the court and since 1943 pupils in Nebraska schools have been permitted to refrain from saluting the flag if they have religious scruples against it.

Objection has sometimes been made to holding graduation exercises in churches and to the practice of permitting clergymen to offer prayer at such exercises. Both of these practices have been, and still are, quite common in Nebraska. The validity of such procedures has not been questioned in the Nebraska courts, but in 1945 the attorney general delivered an opinion on the matter. Basing his opinion on *State v. Scheve* and a Wisconsin case,[83] he pointed out that nothing of a sectarian nature could legally be made a part of such exercises. However, he stated, he was of the opinion that

> an invocation or prayer, given at a high school commencement in our public schools, is not a violation of any legal right unless the prayer offered is sectarian in character. The acknowledgment of a Supreme Being within our schools is not a violation of any constitutional right.[84]

He concluded that where there are "substantial objections to such practice" it would be wise to eliminate it but that, he said, "is a matter for the school officials to determine and not a question of legal right."[85] This opinion of the attorney general would seem to be supported by national practice.

The name of Nebraska's most famous son, William Jennings Bryan, is intimately connected with the attempt to prevent the teaching of evolution in the schools of Tennessee. No statute prohibiting such teaching was passed in Nebraska. In fact, no serious agitation for such a provision was discovered in the author's survey of the legislative materials.

Some general conclusions might be drawn from the above survey of the relationship of church and state in the Nebraska public schools. First, religion in the integrative sense has not been completely separated from public education and probably cannot be so separated.

[82] *West Virginia State Board of Education v. Barnette,* 319 U. S. 624 (1943).
[83] *State ex rel. Conway v. District Board,* 162 Wis. 482 (1916).
[84] *Rep. Att'y Gen. 1944,* 268.
[85] *Ibid.,* 269.

In fact, not only does the state permit such practices as Bible reading in a non-sectarian fashion, but it requires all teachers "to give special emphasis to common honesty, morality . . . and other lessons of a steadying influence." Second, while religion in the integrative sense cannot be separated from education, the problem of keeping religion in the sectarian sense out of the public schools has presented several interesting problems. Sectarianism has not been clearly defined and, as a result, several problems have been solved not in a cut-and-dried fashion, but in a somewhat pragmatic manner. For example, the practice of Bible reading and the use of public school property for religious meetings have been left largely to local option. There is, of course, the possibility of court review in any individual case. The wearing of religious garb by public school teachers, on the other hand, has been forbidden by statute. Third, certain practices, especially that known as "released time," which have aroused great controversy elsewhere, have not been major problems in Nebraska. Fourth, it would appear that Nebraska in its solution to most problems involving the church and state in public education has followed the practice of the majority of the states. Finally, the last few decades have seen no serious legal controversy in Nebraska involving the relationship of church and state in public education. Increased interest in this relationship in other states, however, may well be reflected in Nebraska in the not too distant future.

8 / *Parochial Schools and the State*

THE tremendous growth of the American public school system in the late nineteenth century threatened to inundate the private schools which had earlier been characteristic of American education. Certain religious groups, especially the Roman Catholic and Lutheran, however, insisted on maintaining their parochial schools. The Roman Catholics have by far the largest and most powerful system of denominational schools. The decisions of the plenary councils between 1852 and 1884 laid the foundations for the amazing development of the Catholic school system. As Stokes points out, the position of the hierarchy has consistently required that Catholic parents "send their children to parochial schools when these are available, unless a dispensation is secured from the bishop."[1] At present, although large numbers of Catholic children attend the public schools, about three and one-half million are served by Catholic schools.[2] Most Protestant groups have accepted the public school as the educator of their children. The Lutherans of the Missouri Synod have, however, maintained a large and efficient system of elementary parochial schools.[3] Other Lutheran bodies, especially the American Lutheran Church and the Wisconsin Synod, also support schools. The

[1] Stokes, *Church and State,* II, 648.

[2] In 1954 the total of secondary students served by diocesan, parochial and private schools connected with the Roman Catholic Church was reported to be 636,436. Total of elementary students so served was reported as 3,336,788. See *Official Catholic Directory* (New York, 1955), general summary of statistics opposite p. 1132.

[3] In 1948 the Missouri Synod had 1,120 schools in the United States with an enrollment of 86,383, according to a letter in the possession of the author dated April 18, 1950, from Arthur L. Miller, Executive Secretary of the Board of Parish Education of the Lutheran Church—Missouri Synod.

only other Protestant bodies with any considerable number of parochial schools are the Seventh Day Adventists, Reformed Churches, and Mennonites.

The contemporaneous existence of private and public schools has necessitated continual adjustment. Simply stated, this adjustment has meant the balancing of religious freedom with the needs and practices of the nation. In Nebraska and in the nation, the problems arising out of the need for such adjustment fall essentially into a three-fold classification. First, do the parents and the church have rights prior to those of the state in so far as the education of children is concerned? In other words, do parochial schools have a right to exist? Second, if parochial schools have a right to exist, what, if any, regulation upon their activities may be imposed by the state? Third, may the state aid the parochial schools in any way?

As the influence which the state exercises over the individual has increased, partial answers have been given to these three basic questions. Such answers have offered a working basis for adjustment but have by no means been conclusive. One need not seek far to be convinced of the temporary nature of the various answers. The statements of some influential American educators clearly illustrate their unwillingness to accept fully the existence of parochial schools. Such schools seem to them unwarranted competitors of the public schools. For example, President James B. Conant of Harvard University, in an address in April of 1952 before the American Association of School Administrators, criticized the role of the independent school in American life. His comments were directed especially at the non-public secondary schools. While he stated that he did not question the right of people to organize private schools—for "the United States Supreme Court settled the law on that point in the famous Oregon case of 1926 [*sic*]"—he left no doubt that he felt the private school to be antagonistic to "democratic objectives." A prominent magazine, because it believed "the question raised by Dr. Conant to be one of the most important of our time," published his address in full "together with comments upon it by two critics of his position," Archbishop Richard J. Cushing and Allan V. Heely, Headmaster of Lawrenceville School.[4] Increased requirements and tightened supervision placed upon the parochial schools especially since World War I indicate that the optimum amount of regulation has not as yet been determined. Even more controversial is the third problem area, that concerning state aid to

[4] See "The Private School Controversy," *The Saturday Review*, XXXV (May 3, 1952) 11-15.

private schools. Generally speaking, direct financial aid to the parochial school is considered illegal. Indirect aid, on the other hand, through tax exemption and the aid-to-the-student doctrine has been rather widely granted. Publicly financed bus transportation and books for parochial school pupils have been held legal by the United States Supreme Court on the basis that it is the student and not the school which is benefited.[5]

The right of the parochial school to exist was most seriously threatened in the period immediately after World War I. At that time an effort to ban the private school and to give the public school a monopoly of the education of the youth was made in various parts of the nation. This movement should be seen in the light of a wave of anti-foreign feeling which resulted in a Red Scare, drastically tightened immigration legislation, the revival of the Ku Klux Klan, and the suppression of international cooperation. The attack upon the very existence of the parochial school should be seen, then, in the perspective of this more general postwar reaction.

In the early Twenties the basis of Roman Catholic education, the parochial school itself, was challenged. Out of this challenge came a struggle in at least three states (Nebraska, Michigan and Oregon) which aroused nationwide interest. In Nebraska, the case of *Meyer v. State of Nebraska*[6] involved the issue of whether or not the teaching of foreign languages in the primary schools could be prohibited by the state. Actually, the legality of the parochial school as distinct from the public school was also at stake. At about the same time there was an effort to amend the Michigan constitution with the purpose of halting the growth of the Roman Catholic Church by closing its schools. The interest aroused in the Michigan controversy is indicated by the fact that in the election of November 4, 1924, the amendment was defeated by a vote of 760,571 to 421,472, a total of 1,182,043 votes as compared to the presidential vote of only 1,160,918.[7]

Meanwhile, an act was passed in Oregon in 1922 which required that children eight to sixteen years of age be sent to the public schools. Failure or refusal to send the children to the public schools was declared to be a misdemeanor on the part of the parent or guardian. To test this Oregon statute a suit was brought by the Society of Sisters, a Catholic teaching order which was engaged in operating

[5] See *Everson v. Board of Education*, 330 U.S. 1 (1947) and *Cochran v. Louisiana Board of Education*, 281 U. S. 370 (1930).

[6] 262 U. S. 390 (1923).

[7] Johnson and Yost, *Separation of Church and State*, 137-138.

parochial schools, and by a private school, the Hill Military Academy. The case was finally appealed to the United States Supreme Court.[8] Before the Supreme Court the State of Oregon argued that there was no deprivation of liberty or property without due process of law. The private schools, it was argued, could still train children outside the age limits set in the law and the "liberty of all is subject to reasonable conditions deemed essential by the governing body to the safety, health, peace, good order and morals of the community." Beyond that, compulsory attendance at public schools would leave "an abundance of time and opportunity" for additional instruction in religion. It was pointed out that the voters of Oregon might have based their adoption of the law upon the fear of a rising tide of religious suspicions and upon their conviction that the basic cause "was the separation of children along religious lines during the most susceptible years of their lives." The mingling of races and sects, it was indicated, might be the best safeguard against future internal dissentions and the resultant weakening of the country in the face of foreign dangers. The final point of the brief was that since the states had no control over immigration, each state should be allowed to take the steps it deemed necessary for Americanization of the new immigrants. At that time, it was stated, the majority of the private schools were conducted by religious organizations. Such schools, however, might be followed by schools controlled by those who held economic doctrines destructive to the fundamentals of American government. "Can it be contended," the brief continued, "that there is no way in which a State can prevent the entire education" of its future citizens from "being controlled and conducted by bolshevists, syndicalists and communists?" It is not difficult to see the influence of the Red Scare and it is hardly necessary to point out the similarity of some of these arguments to those made by the Ku Klux Klan. The argument of the Society of Sisters was, among other things, that experience had proved that public and private schools could operate harmoniously together; that the child belongs to the parent and not to the state; and that the statute impaired the obligations of the contract embodied in the Society's corporate charter.

In the unanimous decision declaring the Oregon law unconstitutional, Justice McReynolds succinctly stated a basic principle:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State

[8] *Pierce v. Society of Sisters*, 268 U. S. 510 (1925).

> to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[9]

This decision in the *Pierce* case clearly established the legality of the parochial school, or so it seemed until 1948. In that year, by its decision in the *McCollum* case[10] the United States Supreme Court indirectly cast doubt upon the parochial school as a legal instrument to be used for the compulsory education of the youth. Two major arguments were considered by the court as invalidating the released-time program in the Champaign, Illinois schools. The first was the use of school property in aid of religious instruction. The second, and most emphasized in the decision, was the claim that while the religious classes were supposedly optional, actually the compulsory school laws were used to aid religious sects in "recruiting" pupils and thus "to spread their faith." It seems obvious that if this is a valid argument against released-time programs, it would be equally valid against parochial schools, the attendance at which fulfills the compulsory school requirements.[11]

There is evidence that the thinking of the members of the United States Supreme Court is undergoing change.[12] This apparent change does not necessarily mean, however, that the doctrine of the *Pierce* case guaranteeing the right of the parochial school to exist will go unchallenged. The power of the state is increasing and, at the same time, the importance of thought control for directing action seems to be increasingly recognized. In view of these apparent trends, it may be expected that the right of any institution other than the state to direct the education of youth will be considered more and more suspect.

The legal records of Nebraska indicate that, except for a brief period immediately following World War I, there has been no serious question of the right of parochial schools to exist. This period, of course, coincides with that during which similar moves against the parochial schools occurred in other states. The existence of educational

[9] *Ibid.*, 535.

[10] *Ill. ex rel. McCollum v. Board of Education,* 333 U. S. 203 (1948).

[11] A number of critics of the *McCollum* decision have seen this incongruity. For example, see Edwin S. Corwin, "The Supreme Court as National School Board," *Law and Contemporary Problems,* XIV (Winter, 1949), 20, and Alexander Meiklejohn, "Educational Cooperation between Church and State," *Law and Contemporary Problems,* XIV (Winter 1949), 65-68.

[12] In *Zorach v. Clauson,* 343 U. S. 306 (1952), the Supreme Court held that there was lack of evidence of coercion to get students into religious courses.

facilities other than those afforded by the public schools was recognized in the compulsory education proposition submitted separately with the abortive constitution of 1871. This proposition required that every child between the ages of eight and sixteen years who had "sufficient mental and physical ability" should "attend a public school." The proposition was careful to point out that such attendance would not be required when impracticable or when children were "educated by other means."[13] In 1887, when the first Nebraska compulsory school law was passed, it specifically provided for attendance at either "public or private" schools. As this law was amended by subsequent legislatures, provision continued to be made for fulfillment of compulsory requirements by attendance at other than public schools. Nebraska law in 1954 provided that children were required "to attend regularly the public, private, denominational, or parochial day schools."[14]

That there was some opposition to the parochial schools in the 1890s might be inferred from Governor Boyd's warning in 1891 that while the state furnished education free, "it should at the same time accord to all the right to receive the benefits of education from any source they may select."[15] The same inference might be drawn from a number of bills introduced, but not passed, which aimed at more closely regulating the activities of the parochial schools.

The real threat to the existence of the parochial schools in Nebraska, however, came with the period immediately following World War I. This period saw a comprehensive regulatory program enacted into law. There were also attempts actually to destroy the parochial schools. Two unsuccessful bills introduced in the legislature in 1919 were aimed at eliminating the parochial school.[16] Each aimed at amending the compulsory school attendance statutes in such a way as to strike out all mention of non-public schools, thus making attendance at the public school mandatory.

The attack upon the existence of the parochial schools was also in part reflected in the state constitutional convention of 1919-1920. Wilbur Bryant of Cedar County, a member of the convention, led the assault. Proposal Number 20, introduced by Bryant, read as follows:

> The legislature shall provide for the free instruction and universal compulsory education in the common schools of the state of all children from five years upward until each child has

[13] *Report of the Constitutional Convention of 1871,* III, 471.
[14] *R. S. C. S. 1953,* sec. 79-201.
[15] *S. J. 1891,* 1056.
[16] *H. R.* 4 (1919) and *S. F.* 16 (1919).

> completed the eighth grade or failed because of mental deficiency. Compulsory attendance upon the common schools shall not extend beyond the age of eighteen years.[17]

The similarity of such a provision to the Oregon statute of 1922 is obvious. Like the Oregon statute, it would have effectively eliminated the parochial schools on the elementary level. The convention's committee on education recommended that Proposal Number 20 be indefinitely postponed.

In opposition to the committee's recommendation Bryant launched into one of the longest speeches of the convention—it covered fifteen pages[18]—in support of the thesis that "every child should be compelled to attend the public school during the impressionable period of his or her life." The speech was replete with oratorical flourishes and historical examples. He asserted that the talk of "parental right" was "mere camouflage," for, said he, "behind the parent is the ecclesiastic . . . . The tail wiggles, but the dog wiggles it." He saw in the opposition to his proposal "the conflict of the ages breaking out in a new form—the combat of church and state." While Bryant insisted that he had "no objection to the parochial school so long as it does not interfere with the public school," he failed "to see what connection the rules of syntax, the multiplication table . . . or the geographical location of Patagonia . . . have to do with theology." Moreover, he saw the existence of the parochial school as a special privilege accorded Catholics which other sects would also demand as a right. Eventually, he felt, a demand for division of the school money among the various sects would result. More important to him than these arguments, however, was the conviction that the public school served as a melting pot. In fact, he asserted that the common school was the only place where Americans with common characteristics could be produced. Thus, the public school system, he implied, was essential to American security for "a united country, welded in the bonds of indissoluble union, a race thoroughly amalgated, is the only country that can preserve her independence and retain her self-respect." Sentiment favoring the parochial school, he insisted, was on the increase, and he mentioned districts where the public school had been "absolutely superseded by the parochial school." If this process continued, he said, Americans would be divided into as many castes as there are in India and would be "an easy prey for Japan, or any first-class power, as was India for England." Bryant closed his long speech with an impassioned

[17] *Journal of the Nebraska Constitutional Convention of 1919-1920*, I, 66.
[18] *Ibid.*, 435-449.

appeal to the members of the convention to "throw aside that mean-spirited false ambition of bartering your conscience, your manhood, your opinions and your better self to get votes." Rather, "the individual is lost in the glory of the country" and should permit "America's strength and America's glory" to be his strength and his glory. He therefore appealed to their conscience as citizens and their understanding as statesmen and begged them to "arise to the occasion before it is too late." Said he, "God Almighty hates a coward."

The chairman of the committee on education explained the committee's recommendation of indefinite postponement as being based upon two considerations. First, the legislature in 1919 had provided for vigorous regulation of parochial schools. Second, the committee had decided that it was unwise to present to the people a controversy in which there was so great a difference of opinion. This was especially true, he said, because the proposal was "adverse to the public sentiment as expressed by the people through the last Legislature," because the parochial schools were working harmoniously with the other schools and because the argument over this proposition in the convention might be so severe as to "hamper the good results we might accomplish by our labors here."[19] As a result, the measure was indefinitely postponed by a voice vote.[20]

Bryant was also responsible for the introduction of Proposal Number 21. This proposal would have amended the bill of rights by adding a new article which provided:

> The right of parents to instruct and to train their children in the doctrine, the discipline and the rites of any religion—not immoral—until such child reaches the age of discretion—shall not be questioned. But the right of the State to control and to direct the purely secular education of children within its jurisdiction is hereby declared to be absolute, universal, indivisible and inviolate.[21]

This proposal was apparently not discussed by the convention and was reported by the committee on bill of rights for indefinite postponement.

An interesting example of somewhat informal opposition to the existence of the parochial school is to be found in an opinion of the attorney general issued in 1919. As a result of the passage in 1919 by the legislature of several bills affecting parochial schools, the attorney

[19] *Ibid.*, 450.
[20] *Ibid.*, 451.
[21] *Ibid.*, 67.

general was deluged with requests for clarification. He gave a general opinion in which he summarized and interpreted the various acts. At the end of his summary he commented:

> For the serious consideration of the citizens affected by these bills, this department desires to urge that attendance for the full time in the public schools of this state, raises a presumption of an honest desire to comply with the law.[22]

Such a suggestion by a responsible state official could hardly be interpreted as anything less than a questioning of the legality of the parochial school.

While the attempt to eliminate the parochial school in the period after World War I was a failure, the effort to extend the control of the state over its activities was more successful. Regulation of parochial schools by the State of Nebraska was quite limited prior to World War I. Nineteenth-century regulation was largely limited to the minimum school term requirements under the compulsory attendance statute. The earliest Nebraska compulsory attendance statute required a term of twelve weeks or more. In 1901 the statutes were amended[23] to require parochial schools to keep records and submit monthly reports to public school authorities. The law also provided for the appointment of truant officers with the authority "to apprehend and take to his home or to some public, private or parochial school" any child found in violation of the law. These provisions of the law have remained substantially unchanged.[24] Apparently the only other statute passed before World War I which specifically regulated parochial schools was one of 1911 which established a state "Fire Day."[25] It required that a "Fire Day" be observed with appropriate exercises in all "public, private and parochial schools of the state." It also provided for the preparation of a book on fire dangers and prevention to be distributed to teachers. In addition, it required at least thirty minutes instruction each school month in all schools on the subject of fire dangers and methods of fire prevention.

As early as 1896 the state superintendent of public instruction indicated interest in procuring more information about the parochial schools. This interest was doubtless in part a result of general nationwide criticism of the parochial schools in the Nineties. In that year

[22] *Rep. Att'y Gen. 1920,* 237.
[23] *Laws 1901,* c. 70.
[24] See *R. R. S. 1943,* sec. 79-211.
[25] *Laws 1911,* c. 126.

the report required of county superintendents included space for the names, locations, number of teachers, enrollment, endowment, the denominational connection, and the name and title of the supervisor of private schools. The response by county superintendents to this request for information was meager indeed. In succeeding years the state superintendent's report continued to request the information, but the results remained entirely inadequate. The law of 1901 requiring record keeping and monthly reports should have provided much of the required information. An examination of the reports submitted to the state superintendent, however, indicates that the report of 1923 was the first one which might be considered satisfactory. That report was submitted after considerable legislation regulating the parochial schools had been placed on the statute books. A situation such as this would indicate that regulation of parochial schools by state school officials even as to the length of the school term and attendance was practically nonexistent until after World War I.

Near the end of World War I and immediately following it, the Nebraska legislature, like the legislatures of many other states, passed several statutes aimed at ensuring "Americanization" of its inhabitants. Several of these Americanization laws provided for regulation of the parochial schools. One such law prohibited the use of foreign languages in teaching. This law brought into immediate focus the question of the extent to which the state might regulate the parochial schools.

In 1913, under pressure from the National German-American Alliance,[26] the Nebraska legislature had passed an act commonly known as the Mockett Law.[27] This law made the teaching of a modern foreign language in any school mandatory in grades above the fourth if parents of fifty children attending the school petitioned for it. In 1916 the Nebraska Supreme Court held that the Mockett Law was constitutional.[28] With American entry into World War I general antipathy for anything connected with Germany grew stronger daily. Considerable opposition developed, therefore, against the Mockett Law, and an unsuccessful attempt was made to repeal it in 1917. Finally, in 1918, Nebraska's governor called a special session of the legislature. One of his express purposes was the repeal of the offending law. In his message to the legislature the governor insisted that the operation of the Mockett Law had been "most unsatisfactory." Moreover, he said, "such legislation is vicious, undemocratic and un-Amer-

[26] See Walter H. Beck, *Lutheran Elementary Schools in the United States* (St. Louis, 1939), 318 for a discussion of the activities of this organization.

[27] *Laws 1913*, c. 31.

[28] *State, ex rel. Thayer, v. School District*, 99 Neb. 338 (1916).

ican."[29] Members of the legislature were not unaffected by war hysteria. A resolution declared that "the teaching of the German language" had "wrought a baneful influence upon American citizenship in Nebraska." The same resolution approved the request of the Nebraska State Council of Defense that German or any other foreign language not be taught in the elementary grades. It made special mention of "private or denominational schools" and insisted that "all instruction, whether secular or religious shall be given in the English language during this war." With this feeling rampant in the legislature the Mockett Law was easily repealed. While no legislation could be passed eliminating the teaching of German in parochial schools, the antagonistic attitude of the legislature was made clear through its repeal of the Mockett Law and the resolution opposing such teaching. By its action in 1918 the legislature actually fired the opening gun in the battle over the teaching of foreign languages, especially German, in Nebraska. In this battle the parochial schools, notably those of the Missouri Synod of the Lutheran Church, played a leading part. The Catholics also fully realized that the issues in the controversy were of at least equal importance to their parochial school system.

The legislature met again early in January of 1919. By that time the war was over, but war hysteria had not disappeared. Retiring Governor Keith Neville in his address to the legislature stated that "the key to the problem of Americanization lies in the schools." He recommended that legislation be passed to prohibit the use of foreign languages in teaching all secular branches in both public and private schools. He also suggested that a curriculum equivalent to that taught in the public schools be required of private schools.[30] In his inaugural address, Governor Samuel R. McKelvie, while urging tolerance, insisted that a "genuinely National sentiment" could not be achieved without the use of a common language. He felt that all instruction in the public and private schools, with the exception of foreign languages as such, should be conducted in the English language. "Religious freedom," he pointed out, "should not be abridged" but he felt that "the churches should also be used as a medium through which the use of the English language may be aided and encouraged." In any case, said the governor, "the common use of any foreign language should be discouraged."[31]

Given the temper of the times and the urging of both the retiring and incoming governors, it is not surprising that the legislature acted

[29] *S. J. 1918,* 38.
[30] See *S. J. 1919,* 20.
[31] For the text of Governor McKelvie's address see *S. J. 1919,* 32-33.

to curtail the instruction and use of the German language. One bill would have eliminated all instruction both in school and in private in any modern language other than English for students below the tenth grade. Another more moderate bill would have made the teaching of modern European languages illegal in both public and private schools. A third bill, which became known as the "Siman Law," was passed.[32] Section one of this act provided that "no person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject [to any person in any other language][33] than the English language." Section two stipulated that "languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade." Section three provided punishment for violators. The legislature was not satisfied with merely prohibiting instruction in foreign languages. In another rather drastic act it provided that

> hereafter all public meetings held within the State of Nebraska; meetings held in compliance with the provisions of the Nebraska statutes; political meetings or conventions whether delegates or otherwise, and all meetings or conventions, the purpose and object of which are the consideration and discussion of political or non-political subjects or questions of general interest, or relating to the well being of any class or organization in the State of Nebraska, or for the endorsement or rejection of any candidate, law or measure to be voted upon at any election within said state, shall be conducted in the English language exclusively; providing the provisions of this Act shall not apply to meetings or conventions held for the purpose of religious teachings, instruction or worship, or lodge organizations.[34]

On December 2, 1919, when a constitutional convention met at Lincoln, one of the issues with which it concerned itself was the teaching and use of foreign languages. Considerable pressure was applied by various groups interested in prohibiting the use of foreign languages in the state. Especially active in this regard was the American Legion. Not only did a number of petitions come from local American Legion posts, but the state convention of the organization went on record in favor of a constitutional amendment prohibiting the use of foreign languages in the schools. Several proposals aimed at limiting the use of foreign languages were introduced in the con-

[32] *Laws 1919*, c. 249.

[33] The laws as printed were inaccurate. See *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 104 Neb. 93, 95 (1919).

[34] *Laws 1919*, c. 234.

vention. The debates of the convention provide an interesting and informative summary of the major arguments for and against such limitation. Those who opposed placing limitations on the teaching of foreign languages insisted that youth find it easier to learn a language and that prohibition of foreign languages would interfere with religious freedom as well as with parental and private rights. A knowledge of langauges might well be useful, they said, in business and in protecting the nation in international affairs. One speaker felt that the move against foreign languages was "all political camouflage and just cheap patriotism." Those who favored limiting the use of foreign languages based their demands on the necessity of a common language for creating a common nationality and upon the fact that the veterans were demanding it. The result of these debates was a proposed constitutional amendment, later adopted by the voters, which provided:

> The English language is hereby declared to be the official language of this state, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools.[35]

In the same month that the constitutional convention met, a case involving the constitutionality of the Siman Act was considered by the supreme court.[36] The Nebraska District of the Missouri Synod requested an injunction against the enforcement of the Siman Act declaring that it was unconstitutional under the Fourteenth Amendment of the Federal Constitution and under several provisions of the state constitution. The Nebraska District insisted that the law prohibited religious and moral instruction in accordance with the doctrines of the church. Knowledge of foreign languages, it was asserted, was not harmful and the use of the language of the parents was necessary to teach children the English language. Property rights in parochial school buildings and grounds were destroyed as was good will towards the schools. Moreover, the law interfered with purely domestic affairs and invaded the right of the parent to prescribe the course of instruction for his child. Likewise, since the schools were private, once they had discharged their duty to the state by instructing their pupils in secular branches in a course of study similar to that of the public schools, instruction of other subjects was a private right. The state, it

[35] *Const.* Art. I, sec. 27 (1875-1920).

[36] *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 104 Neb. 93 (1919).

was claimed, had no monopoly of teaching. The rights of teachers were also violated because teachers were prohibited from engaging in their calling. In addition, it was claimed, the law discriminated against teachers in schools while permitting private tutors to teach as they desired.

Justice Letton, who wrote the opinion of the court, briefly discussed the purpose of the Siman Act. He pointed out that the operation of the draft act of 1917 had disclosed a condition "the evil consequences of which had not been fully comprehended." Thousands of men, he said, were unable to understand English. Also, where "there were local foci of alien enemy sentiment" it was usually found that instruction in the parochial schools in those communties was given in foreign languages. The purpose of the Siman Act, he said, was the same as that of the comprehensive amendment to the school laws setting up additional requirements for both public and parochial schools,[37] the law prohibiting religious garb in public schools,[38] and the law prohibiting alien teachers.[39] All these laws, said the justice, aimed as an ultimate objective at "the upbuilding of an intelligent American citizenship, familiar with the principles and ideals upon which this government was founded." He asserted that

> the concept that the state is everything, and the individual merely one of its component parts, is repugnant to the ideals of democracy, individual independence and liberty expressed in the Declaration of Rights, and afterwards established and carried out in the American Constitution. The state should control the education of its citizens far enough to see that it is given in the language of their country, and to insure that they understand the nature of the government under which they live, and are competent to take part in it. Further than this, education should be left to the fullest freedom of the individual.[40]

The justice then turned to some of the specific charges made by the Nebraska District. He found nothing in the Siman Act "to prevent parents, teachers or pastors from conveying religious or moral instruction" in any language or in teaching other branches of learning in such languages provided that such instruction did not interfere with the required studies. He felt that the legislature had not intended to bar a child from being taught any studies which might be desired once

[37] *Laws 1919*, c. 155.
[38] *Ibid.*, c. 248.
[39] *Ibid.*, c. 250.
[40] *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 104 Neb. 93, 99-100 (1919).

that child had attended a parochial or public school for the required time. There was no question in his mind about the cultural effect of the knowledge of a foreign language, but he could see no necessity for teaching a foreign language in order to learn the English language. The other claims of the Nebraska District were answered by appealing to the police power. The justice pointed out that

> neither the Constitution of the state nor the Fourteenth amendment takes away the power of the state to enact a law that may fairly be said to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order.[41]

He felt that if the state under this power could compel solvent banks to pay losses of depositors in insolvent banks, or could enact workmen's compensation laws then,

> "it surely is not an arbitrary exercise of the functions of the state to insist" that the fundamental basis of the education of its citizens shall be a knowledge of the language, history and nature of the government of the United States, and to prohibit anything which may interfere with such education.[42]

Such was the law in question and it was not obnoxious "to any provision of either the state or federal constitutions."

On the surface, this decision upholding the Siman Act appeared as a victory for the forces opposed to foreign language teaching. The court, however, had specifically stated that it found no prohibition in the act against either teaching foreign languages as such or teaching other subjects in foreign languages as long as such teaching did not interfere with the regular course required by law. This portion of the decision was really a victory for the proponents of foreign languages.

The Nebraska legislature, in view of the decision in the case testing the Siman Act, replaced that act with the so-called Reed-Norval Act.[43] This new act repeated verbatim the recently adopted constitutional amendment declaring English to be the official language of the state and requiring that the "common school branches" in all schools be taught in English. In addition, it prohibited anyone in any school from teaching any subject in any language other than English. Exceptions were permitted for those who had completed the eighth

[41] *Ibid.*, 104.
[42] *Ibid.*
[43] *Laws 1921*, c. 61.

grade. Sunday schools were excepted and the law specifically provided that one might teach his own children in his own home any foreign language. The law also forbade any organization "whether social, religious or commercial, to prohibit, forbid or discriminate against the English language" in meetings. With the expectation that the law would go before the courts, it was provided that the sections were independent and therefore the declaration of one portion as unconstitutional would not affect any other section.

Meanwhile, the Nebraska District had not been completely satisfied with the supreme court's decision on the Siman Act and another test case was soon developed.[44] The new test case, as appealed to the supreme court, involved a teacher in a Lutheran parochial school who had given religious instruction in German during an extended noon-hour. He had been fined under the Siman Act. Backed by the Nebraska District, he appealed the matter to the supreme court, which decided the case in 1922. By this time the Siman Act, which was under examination in this case, had been replaced by the more stringent Reed-Norval Act. Justice Flansburg, delivering the opinion of the court, asserted that the purpose of the Siman Act was that of establishing English as the mother tongue of all children reared in the state. The question before the court, said the justice, was not whether the policy of the law was correct, for that was a matter for the legislature to decide. Rather, the question before the court was whether the statute came within the lawful exercise of the police power. In fact, said the justice,

> the whole question resolves itself to this: Does the statute interfere with the right of religious freedom, by prohibiting the teaching of a foreign language, when that language is taught with the idea and purpose of later using it, at some other time or place or in the school itself, in religious worship.[45]

The German language, the court felt, was not a part of the religion of the church in question, and the statute prohibiting the teaching of it in a parochial school did not interfere with the right of religious freedom as guaranteed by the constitution. Moreover, while there was complete freedom of religious belief, that did not mean that an individual "will be protected in every act which he does which is consistent with those beliefs." Acts which are inimical to the public welfare may be prohibited, "though they are done in pursuance of and in con-

[44] *Meyer v. State*, 107 Neb. 657 (1922).
[45] *Ibid.*, 661.

formity with the religious scruples of the offending individual." The court also showed an amazing consideration for the health of children who might be expected to learn outside of regular school hours. It was pointed out that the daily capacity of children to learn was "comparatively small" and that they must have ample time for exercise and play. A selection of the courses that might be taught, therefore, was obviously necessary. The implication of these remarks was that the state had made the selection of courses to be taught and the addition of others would be harmful to the health of the children. The real bombshell, however, was the overruling of the decision in the earlier case[46] that the law applied only to the regular school hours set apart for the teaching of secular subjects. Justice Flansburg insisted that the wording of the statute required that foreign languages not be taught in school. This meant, he said, that they should not be taught whenever the pupils of the school should be assembled in the school for the purpose of receiving instruction. Such prohibition was not limited only to "regular school hours."

The decision of the court was not unanimous. Justice Letton and Chief Justice Morrissey dissented from the portion overruling the decision in the previous case. Their dissent was based squarely upon the contention that the legislature might not "infringe upon the fundamental rights and liberty of a citizen protected by the state and federal Constitutions." They insisted that the fundamental right of the parent to control the education of his child was denied by the majority opinion. Once the parent had complied with the proper requirements of the state as to education, he could "give his child such further education in proper subjects as he desires and can afford." While the state had complete control over tax-supported schools and could supervise and require general standards of other schools, it had no right to prevent parents "from bestowing upon their children a full measure of education in addition to the state required branches." The dissent scoffed at the idea expressed in the majority opinion that the limitation on foreign languages was a result of legislative concern for the health of children. Rather, stated the dissent,

> it is patent, obvious, and a matter of common knowledge that this restriction was the result of crowd psychology; that it is a product of the passions engendered by the World War, which had not had time to cool.[47]

[46] *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 104 Neb. 93 (1919).

[47] *Meyer v. State,* 107 Neb. 657, 669 (1922).

The dissent concluded with an assertation that while resistance to the arbitrary powers of kings was necessary in the past, now it seemed "necessary to resist encroachments by the legislature upon the liberty of the citizen protected by the Constitution."

The vigorous dissent of Justice Letton and Chief Justice Morrissey did not change defeat into victory for the supporters of the teaching of foreign languages in parochial schools. It did, however, encourage them to appeal the matter to the United States Supreme Court. In 1923 the highest court of the land examined the Siman Act for constitutionality and found that it violated the Fourteenth Amendment.[48] Justice McReynolds, who wrote the opinion in the case, pointed out that while the court had never attempted to define exactly the liberty guaranteed in the Fourteenth Amendment,

> without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[49]

Justice McReynolds continued by insisting that it was the duty of parents to provide for the education of their children and that mere knowledge of the German language was not harmful. The right of parents, therefore, to engage Meyer to instruct their children in German was within the liberty of the Fourteenth Amendment. The Nebraska legislature had attempted to interfere "with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own." He emphasized that the state might "go very far" to improve the quality of its citizens "but the individual has certain fundamental rights which must be respected." While it might be advantageous, the justice observed, if all had ready understanding of English, such an end could not be coerced by unconstitutional means, for "a desirable end cannot be promoted by prohibited means." The question which concerned the court, said Justice McReynolds, was the prohibition of the teaching of foreign languages, for

[48] *Meyer v. State of Nebraska*, 262 U. S. 390 (1923).
[49] *Ibid.*, 399.

> the power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports.[50]

Upon the basis of the above arguments the decision of the Nebraska Supreme Court was overruled and its interpretation of the Siman Act declared unconstitutional.

In the meantime, injunction proceedings had been brought before the Nebraska Supreme Court to test the Reed-Norval Act.[51] The majority of the court had found the questions presented largely controlled by its decision in *Meyer v. State.* It had held, therefore, that the limitations on language teaching as contained in the Reed-Norval Act were a reasonable exercise of the police power. They were not discriminatory and they did not deprive anyone of life, liberty or property without due process of law. Chief Justice Morrissey dissented. The Reed-Norval Act was discriminatory, he felt, since a wealthy or cultured parent might teach his child a foreign language in private but those less wealthy or cultured might not have their children taught the same language in school. The prohibition of foreign language teaching in the schools was not a reasonable exercise of the police power because it prohibited acts not injurious to the public welfare. Surely, he insisted, if a foreign language is not hurtful to the state when taught by a private tutor, the same language is not harmful when taught in a school.

Because this decision on the Reed-Norval Act was unfavorable to the Nebraska District and its parochial schools, it was also appealed to the United States Supreme Court.[52] The appeal was considered by the court in conjunction with similar appeals from the highest courts of Iowa and Ohio. On June 4, 1923, the same day that *Meyer v. State of Nebraska* was decided, the court in a brief decision declared the foreign language laws of all three states unconstitutional.[53] Less than a month later the Nebraska Supreme Court, citing the decisions of the United States Supreme Court, held the Reed-Norval Act void because it violated the Fourteenth Amendment.[54]

[50] *Ibid.*, 402.

[51] *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 108 Neb. 448 (1922).

[52] *Nebraska District of Evangelical Lutheran Synod v. McKelvie,* 262 U. S. 404 (1923).

[53] See *Ibid.; Bartels v. State of Iowa,* 262 U. S. 404 (1923); *Bohning v. State of Ohio,* 262 U. S. 404 (1923); and *Pohl v. State of Ohio,* 262 U. S. 404 (1923).

[54] *Busboom v. State,* 110 Neb. 629 (1923).

The legal battle over the right to teach foreign languages in parochial schools ended in 1923 with a victory for those who desired foreign language instruction. While on the surface the teaching of foreign languages was the central issue in the controversy, the implications of the struggle were considerably broader. The right of the parent, as against the state, to regulate the education of the child was at stake. The Supreme Court of the United States, thus, set up limits to the power of the state to regulate and control the education of the child. Likewise, by recognizing the fundamental right of the parent to direct his child's education, the court, in effect, recognized the right of the private or parochial school to exist.

Although the statutes attempting to limit the teaching of foreign languages aroused the most popular interest and culminated in a legal battle of nationwide importance, several other statutes placing limitations in one way or another upon the parochial schools were passed in the period immediately after World War I. The major statute specifically providing for regulation of the parochial schools was an amendment to the compulsory attendance law.[55] Like the Siman Act, it was a part of the Americanization program of the legislature. It provided that all private schools and all teachers in those schools were in the future to be "subject to and governed by the provisions of the general school laws of the state so far as the same apply to grades, qualifications and certification of teachers and promotion of pupils." In addition, all private schools were to have "adequate equipment and supplies," and were to be graded the same and to have courses of study similar to those of the public schools. The following sections of the act expanded and clarified its application. For example, it was required that all teachers in the private or parochial schools have teacher's certificates. These certificates were to be of the type required if the teachers were to teach in the public schools, where their pupils would attend in the absence of the private school. Curriculum and activities were dictated to the extent that all schools were required to give courses in history and civil government and were to conduct "such patriotic exercises as may be prescribed from time to time by the state superintendent." The law provided some protection for the private or parochial school in that its owner or governing board was given "authority to select and purchase textbooks, equipment and supplies, to employ teachers and to have and exercise the general management of the school" subject to the provisions of the act. Likewise, the act specifically stated that nothing in it was to be construed

[55] *Laws 1919*, c. 155.

so as to interfere with religious instruction. To ensure compliance with the other provisions of the act, inspection of the private schools by the county or city superintendent was provided. These officials were to report any subversive activities or failure to comply with the act. In cases of failure to comply, the school was to be closed and the children sent to the public schools. Moreover, fines and imprisonment were provided for violating the act. While the provisions of this act have remained substantially unchanged, minor amendments clarifying its operation, although not changing it in principle, were passed in 1921. It was then provided that inspections of the private or parochial schools should be made twice a year and that the officials of the schools should assist and cooperate in such inspection.[56] This law also modified the compulsory school law by insisting that all children attend school regularly "for the entire time each year in which the public day schools" in the particular district were in session.

In addition to the statute just discussed, the legislature in 1919 also imposed certain other regulations on the parochial schools. For example, by an amendment to the free high school act it indirectly regulated the curriculum of parochial schools.[57] This amendment spelled out the subjects to be included in the course of study in the first eight grades and required that students desiring free high school tuition pass uniform examinations in these particular subjects. In effect, this required instruction in these subjects in elementary parochial schools if students from those schools expected to attend public high schools. In a similar fashion, the law prohibiting aliens from teaching and the law setting up certification requirements for teachers regulated parochial schools with reference to the teachers whom they might employ. These laws were all a part of the legislature's Americanization program.[58]

While the legislative session of 1919 saw the major laws regulating parochial schools put on the statute books, in succeeding years several attempts were made to regulate further both parochial and public schools. One successful attempt was the law passed in 1927[59] which required all teachers in the first twelve grades of all schools to place special emphasis upon honesty, morality, and other virtues "which tend to promote and develop an upright and desirable citizenry." The

[56] *Laws 1921*, c. 53.

[57] *Laws 1919*, c. 152.

[58] Laws prohibiting the wearing of religious garb in public schools (*Laws 1919*, c. 248), prohibiting display of certain flags (*ibid.*, c. 208), and making syndicalism unlawful (*ibid.*, c. 261) may also be seen in the same perspective.

[59] *Laws 1927*, c. 85.

state superintendent of public instruction was charged with the duty of preparing an outline to aid in carrying out the purposes of the law and this outline was to be incorporated into the regular course of study. Various other attempts to enlarge the control and supervision of the state over the schools were unsuccessful. For example, in 1921 a bill which required that playgrounds at all schools be contiguous and at least equal in size to the school building failed to pass. In 1933 a bill setting up a uniform school textbook commission would have imposed certain selected textbooks on all schools. Attempts to impose loyalty oaths on all teachers, both those in public and those in private schools, failed in 1921 and 1935. The loyalty oath requirement passed in 1951 applied only to employees, including teachers, paid out of public funds.[60]

The general terms of the statute mentioned above which provided for instruction in honesty, morality and the constitutions of the state and nation must have appeared inadequate to the times, for in 1949 a much more detailed statute was passed aimed at developing "an informed, loyal, and patriotic citizenry."[61] The unmistakable intent of the legislature seems to have been to apply the act in its entirety to private as well as public schools. The first subdivision setting up committees of Americanism does not specifically mention private schools, but each of the other sections requiring certain curriculum offerings and patriotic observances specifically applies the statute to "every public, private, denominational, and parochial school." This 1949 statute set out certain requirements for all schools after insisting that every citizen should be acquainted with the nation's history, "be in full accord with our form of government," and aware of the liberties and opportunities available here as well as of the sacrifices and sufferings of those who made them possible. It provides for the setting up of committees on Americanism to examine and approve history and civics textbooks, to examine teachers as to their character and acceptance of the American form of government, and to take any other steps necessary for carrying out the provisions of the law. The statute also provides for material to be included in the curriculum. In all grades below the sixth at least one hour per week is to be devoted to exercises and teaching which will include the recitation of stories "having to do with American history, or the deeds and exploits of American heroes"; memorization of the "Star Spangled Banner" and "America"; and instruction relative to the flag. In all schools in at least two of

[60] *Laws 1951*, c. 206.
[61] *Laws 1949*, c. 256, sec. 19.

three grades from the fifth to the eighth at least three periods per week are to be devoted to teaching American history "from approved textbooks, taught in such a way as to make the course interesting and attractive, and to develop a love of country." In the first two high school grades at least three periods a week are to be devoted to teaching civics. In the civics instruction specific attention is to be devoted to the constitutions of the United States and Nebraska; to "the benefits and advantages of our form of government and the dangers and fallacies of Nazism, Communism, and similar ideologies"; and to the duties of citizenship. In addition to the above requirements patriotic exercises are to be held in all schools on specifically mentioned national holidays. Responsibility for carrying out the provisions of this law is placed upon the state superintendent, county superintendents and "the superintendent of each individual school in the state."

In 1949 a further tightening of regulations on schools resulted from the passage of a law setting up procedures for accrediting all schools under the supervision of the superintendent of public instruction.[62]

The above survey of state regulation of parochial schools in Nebraska would indicate that prior to World War I there was little actual regulation. The war, however, heightened feelings against anything thought to be in the least "foreign." This anti-foreign feeling brought with it in Nebraska a comprehensive Americanization program. The implications of this Americanization program were defined more or less clearly by the courts. In the course of the legal controversy, the United States Supreme Court upheld both the right of the parochial schools to exist and their right to be free from excessive regulation by the state. Just what constituted permissable regulation of parochial schools by the state, however, was not clearly defined. The period following World War II was again a period of international stress which resulted in heightened feelings against "foreign" influences. As a result, more legislation was passed regulating the curriculum and standards of all schools, including the parochial schools. It would appear that regulation of the parochial schools by the state in Nebraska has in the past been directly related to the amount of anti-foreign feeling engendered by international tension.

Thus far in this chapter two central problems involving the relationship of the parochial school to the state have been discussed. The United States Supreme Court has decided that not only may parochial schools exist, but that the state is limited in the control it may impose

[62] *Ibid.*, c. 248.

upon such schools, although the extent of that control has not been clearly defined. The degree to which the state may aid the parochial school is the third basic problem which complicates the adjustment of the parochial school to the state.

In the national picture the position of the state relative to the aid of parochial schools appears to be in flux at mid-century. The general Roman Catholic position has been that private schools are really public in all senses save two: they are not secularized and they are only partially, rather than wholly, under the control of the state. In view of this fact and because such schools relieve the state of a considerable financial burden by educating a large segment of the youth, the Catholic view has normally been that state financial aid to parochial schools is no more than justified. The prohibition of such aid, they insist, imposes a double tax burden upon Catholics. Protestants and non-church members normally hold to the view that if parents wish to have their children receive a special education which is not offered in the public schools, then they should be willing to pay for it.

Previously in this study it was pointed out that from the beginning the state constitution has included provisions aimed at prohibiting the use of public funds for the support of sectarian schools. A survey of the constitutional history of the state indicates that these provisions have, with each succeeding constitution, been more completely spelled out, until the present constitution provides:

> No sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes, nor shall the state accept any grant, conveyance, or bequest of money, lands or other property to be used for sectarian purposes. Neither the state Legislature nor any county, city or other public corporation, shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof. No religious test or qualification shall be required of teacher or student, for admission to or continuance in any public school or educational institution supported in whole or in part by public taxation.[63]

The debates of the constitutional convention of 1919-1920 indicate the word "owned" was included because of fear that the legislature might find an excuse "under the guise of military training or normal training or what not" to give financial aid to private schools. The im-

[63] *Const.* Art. VII, sec. 11 (1875-1920).

plications for the relationship of church and state were specifically mentioned.[64]

There have been differences of opinion not only over whether aid should be given to parochial schools, but also over what constitutes aid. The determination of what aid by the state is prohibited is a difficult task. In a way, the very permission given to religious groups to substitute their schools for the public schools might be considered a form of aid. Actually, in an indirect way, public funds are used as a result of this substitution. Public funds are used, for example, to pay the salaries and expenses of inspectors who visit private schools. Likewise, the compulsory school law aids parochial schools by ensuring regular attendance. In fact, since 1899 publicly paid truant officers have been provided by law. At present they are given authority to apprehend and to compel children to attend "some public, private, denominational, or parochial school." It is well to recall the opinion in the *McCollum* case, which emphasized that the compulsory school laws of Illinois were illegally used to recruit pupils for released-time religious classes. Certainly the same principle would apply even more strongly with reference to parochial schools. While such matters as these may seem insignificant, the principle is involved and they illustrate the ramifications and difficulties of the problem of determining what constitutes aid to parochial schools. Moreover, a New York court at one time held that the mere dismissing of students and the handling of attendance records for a released-time program by teachers paid out of public funds was use of those funds for sectarian purposes.[65] The affording of certain incidental services such as fire and police protection might also be considered as aid by the state or its subdivisions to parochial schools. Normally, however, the aid which is questioned is more obvious and concerns the granting or use of public funds either directly or indirectly in favor of parochial schools. Such aid, as it applies to Nebraska practice, will be the major concern of the remainder of this chapter.

While the constitutions of the state seemed to prohibit grants of public funds to the parochial schools, it is not unlikely that direct grants of public funds were made during the early history of the state to schools which would now be considered parochial schools. An act of the legislature in 1869, for example, authorized and required the Omaha school board to grant one thousand dollars to the German School Association. This grant was to be made after a suitable school-

[64] See *Journal of the Nebraska Constitutional Convention of 1919-1920,* II, 2661.
[65] *Stein v. Brown,* 211 N. Y. S. 822 (1925).

house had been built. The law provided that school was to be held six months annually and that "no sectarian doctrines" were to be taught.[66] A survey of the legal records of the state indicates that wide interest in prohibiting public aid to parochial schools came in Nebraska after World War I. This increased interest is indicated not only in the constitutional amendment approved in 1920,[67] but also in questions directed to the attorney general and in actual litigation.

Although it has not come before the state supreme court, it would seem a well-established principle of Nebraska practice that tuition payments to parochial schools may not be made out of public funds. In 1917 the attorney general advised the state superintendent that public funds might not be distributed to private or parochial schools doing normal training work.[68] Likewise, he advised, there was no authorization for payment of free high school tuition to such schools. In 1921 the attorney general ruled that a school district might not pay free high school tuition to Nebraska Central College, "a denominational institution and not a public high school."[69] The attorney general again upheld the prohibition of tuition payments to a parochial school in 1939.[70] The Federal Government, of course, under the "G. I. Bill" pays tuition directly to denominational schools.

A more complicated problem of determining state aid to parochial schools occurs when public and parochial schools are physically mixed. Such a mixture sometimes results when public schools rent buildings owned by churches or when parochial schools use public school buildings and equipment. Nebraska has had examples of both kinds of mixture.

In the early Thirties state officials were faced with the problem of determining whether or not a school claiming to be a public school, but linked with a parochial school, was qualified to receive public school funds. The state superintendent of public instruction decided that the school was not qualified to receive public funds. He therefore denied an apportionment of state school funds to District Number Six of Cedar County, and refused to approve it as a school qualified to offer free public high school education. In 1930 the attorney general, upon request, advised this school district that although it was a regularly organized district, it employed garbed Roman Catholic teachers and rented rooms in a parochial school building in which religious

[66] *Laws 1869,* 279-280.
[67] See *Const.* Art. VII, sec. 11 (1875-1920).
[68] *Rep. Att'y Gen. 1918,* 26.
[69] *Rep. Att'y Gen. 1922,* 321.
[70] *Rep. Att'y Gen. 1942,* 693-694.

instruction was given. He pointed out that the statutes prohibited garbed teachers in public schools; that the constitution prohibited sectarian instruction in schools supported in whole or in part by public funds; and that the statutes give the state superintendent power to decide disputed points in the school law. He concluded by insisting that the laws had been broken and that the nuns were lucky not to have their licenses revoked. Likewise, he said, the school board was lucky to have escaped prosecution.

The school board was not satisfied with the opinion of the attorney general. A mandamus from the district court was sought ordering the superintendent of public instruction to recognize the school as a public school district entitled to share in the state trust funds created for secular public school purposes. Upon refusal of the district court to issue the mandamus, the case was appealed to the state supreme court. Justice Rose, who wrote the opinion of the court, emphasized that the court questioned neither the qualifications of the teachers nor the adequacy of the physical plant in which the school was held. After an examination of the situation, however, he commented:

> The school building and surroundings, the religious emblems, the sectarian textbooks and catechism, the prayers of the pupils, the garb and devotional attitude of the sisters and the instructions and services of the parish priest in the chapel and classrooms create an environment that reflects the spirit, example and belief of the Catholic religion in the school itself. Inculcation of that religion is part of the school work. Undisputed evidence in the record will admit of no other conclusion.[71]

He concluded that the use of the school funds to support this type of sectarian instruction would be an illegal diversion of public funds. This decision of the Nebraska court would seem to be in agreement with the decisions of the courts of other states under similar circumstances. It would appear that while public schools may rent buildings owned by religious groups, "such renting must be in good faith" and should not be merely a device for an illegal fusion of a parochial with a public school.[72]

In 1923 the attorney general was asked what could be done to prevent a parochial school from using public school funds and equipment, including the district schoolhouse. He suggested that the school district officers be enjoined from permitting such use. He also implied

[71] *State, ex rel. Public School District, v. Taylor,* 122 Neb. 454, 457 (1932).
[72] Zollmann, *American Church Law,* 97-98.

that such school district officers might be personally liable for wrongful diversion of public funds.[73]

Various types of indirect aid have been sought by parochial schools. Tax exemption is, without question, the major type of indirect aid granted to parochial schools, but there has been interest in acquiring other aids as well. The provision of textbooks and various supplies to pupils in parochial schools is one such aid afforded in some states. This practice was upheld by the United States Supreme Court in 1930 on the ground that the aid was to the students and not to the schools.[74] In 1936, the Nebraska Attorney General was asked his opinion as to whether or not the board of education of Dodge, Nebraska could purchase textbooks for pupils attending St. Wenceslaus School in Dodge. The attorney general cited the constitutional provision prohibiting the appropriation of any public funds in aid of any sectarian school not exclusively owned and controlled by the state. On the basis of this provision he concluded that it would not be lawful to use public money for such a purpose.[75] This problem has not reached the state supreme court. Such aid would appear illegal under the present interpretation of Nebraska law. It is interesting to note that since 1911 books of instruction on the subject of fire danger published at public expense have been distributed to all teachers, both public and private.

Nineteen states have provided free transportation for pupils to parochial as well as public schools.[76] This practice, like the furnishing of free textbooks, is justified on the basis that the aid is given to the child and not to the parochial school.[77] Nebraska's first free transportation act provided for transportation under certain conditions "to any other school" which pupils "may lawfully attend."[78] This law was amended, however, so that transportation can be provided only to schools organized as public school districts. Under present Nebraska law the furnishing of free transportation to parochial school pupils is apparently illegal for the statute refers repeatedly to public and district schools with the obvious intent of limiting payments to those attending public schools. In the fall of 1953 the attorney general held that a public school district operating school buses for the purpose of transporting pupils to and from a public school might not also trans-

[73] *Rep. Att'y Gen. 1924,* 634.

[74] *Cochran v. Louisiana Board of Education,* 281 U. S. 370 (1930).

[75] *Rep. Att'y Gen. 1936,* 189.

[76] Johnson and Yost, *Separation of Church and State,* 164.

[77] The United States Supreme Court so held in *Everson v. Board of Education,* 330 U. S. 1 (1947).

[78] *Laws 1897,* c. 64.

port pupils to and from a parochial or private school in the same district even if the district were reimbursed for such transportation.[79]

The federal school lunch program was established in 1946. Under its provisions, the Federal Government subsidizes school lunches for children in both public and parochial schools. The costs of administration and the disbursement of funds fall upon the individual states. In Nebraska the school lunch program for public schools is administered by the state superintendent's office. The administration of the program in parochial schools in Nebraska is vested in the Federal Production and Marketing Administration area office in Chicago. According to information from the latter office, Nebraska private schools have participated in the program from the beginning in 1946, and since 1947 some fifty such schools have been participating.[80]

Certain conclusions might be drawn from the above survey of the problems growing out of the adjustment of the parochial school to the state in Nebraska. The right of the parochial school to exist has been clearly supported by the United States Supreme Court. Its right of existence is based upon the right of the parent, guaranteed by the Fourteenth Amendment, to direct the education of his child. In Nebraska, statutes provide that attendance at a parochial school fulfills the compulsory school attendance requirements of the state. The extent to which the parochial school may be legally regulated by the state has not been clearly defined by the courts. It has been held that the parochial school is not a completely free agent, for it may be reasonably regulated and supervised by the state. Such regulation and supervision in Nebraska, as in other states, has included compulsory attendance for a specified term, certain curriculum requirements, certification of teachers, and periodic inspection by state officials. It may be anticipated that both regulation and supervision will increase, as in the past, in times of international tension. It is possible, of course, that control by the state may be increased to such an extent that for practical purposes the existence of the parochial schools as distinct from the public schools would be threatened. In any case, further controversy may be anticipated in relation to this problem. Some aid has been accorded parochial schools by the state in Nebraska. In the main, direct aid in the form of tuition or other grants of public school

[79] *Rep. Att'y Gen. 1954,* 262.

[80] Letter to the author dated October 14, 1952 from Mr. O. F. Beyer, Area Field Supervisor of the Food Distribution Branch of the Production and Marketing Administration, Chicago, Illinois. Mr. Beyer commented in this letter in answer to the author's request for specific information on participating parochial schools that "We regret, however, that we are not permitted to release a listing of participating schools to individuals or private organizations."

funds has been prohibited. Various types of indirect aid, ranging from tax exemption to permission to substitute parochial school training for public school training, have been given parochial schools in Nebraska. Certain types of indirect aid, such as free bus transportation and textbooks, given by some other states under the authority of the student-aid doctrine, however, have not been considered legal in Nebraska. In recent years the United States Supreme Court has declared such indirect aid legal in certain states. At the same time, Roman Catholic leaders seem to be placing more emphasis upon indirect rather than upon direct aid.[81] There is some indication in Nebraska of a growing demand by parochial school groups that students of these schools, while carrying on the major part of their studies at the parochial school, be afforded instruction in neighboring public schools in certain specialized subjects such as domestic science, music, and shop. Continued growth of such a demand would pose interesting new problems of adjustment. In view of these facts, it may be expected that the future will bring increasing demands for such aid to parochial schools in Nebraska.

At mid-century it appears that in place of a "wall of separation" erected between the parochial school and the state, a reasonable working equilibrium between them has been achieved in Nebraska. It is to be hoped that this satisfactory adjustment may be retained in the future. The possibility is present, however, that either the desire of the state further to regulate the parochial school or the desire of the parochial school for further aid from the state may destroy the balance at any time.

[81] Stokes, *Church and State,* II, 658-660 and 755.

9 / *Tax Exemption*

VARIOUS aids and privileges accorded religious groups and their representatives have been discussed in earlier chapters. The most substantial and most generally granted aid is exemption from taxation for the property of religious groups. The Federal Government not only has provided for exemption of religious corporations from income tax payments under certain conditions, but has permitted individuals for taxation purposes to deduct a portion of their income if such income is given to tax-exempt institutions. All states also provide tax exemption either explicitly in their constitutions or in legislation. In thirty-two state constitutions tax exemption of property used for religious purposes is specifically mentioned. In the other sixteen states implied power has served as the basis for exempting property of religious groups from taxation.[1]

The exemption of public property from taxation rests on a sound basis, for there would be no good reason for the state to tax itself or its subdivisions. The exemption of charitable and educational institutions also rests on a reasonable basis, because such institutions relieve the state of burdens it would otherwise have to carry. The extension of tax exemption to the property of religious organizations is more difficult to justify. As Zollmann points out, "charity and education may be said to be established in the policy of the state" but an establishment of religion is prohibited.[2] In fact, the constitutions of all states provide in some fashion that no person shall be compelled to support any church.[3]

[1] Torpey, *Judicial Doctrines of Religious Rights,* 173-174.

[2] Zollmann, *American Church Law,* 327.

[3] Harpster, "Religion, Education and the Law," *Marquette Law Review,* XXXVI (1952-1953), 33. For the Nebraska prohibition see *Const.* Art. I, sec. 4 (1875-1920).

Those who favor tax exemption for the property of religious societies claim that it is justified by the moral services rendered to the state by the churches and that the practice does not grant public funds to religious bodies, but merely prevents them from being penalized. Those who oppose the principle of tax exemption insist that the distinction between a direct grant of money and the failure to send a tax bill is vague indeed.

On a nationwide scale, tax exemption of the property of religious organizations has an interesting history. In colonial times, as an agency of the state, the church was not taxed. When legal separation of church and state occurred at the end of the colonial period and early in the national period, the customary exemption of church property was continued and, in fact, extended to dissenting churches.[4] This practice received general public support. About the middle of the nineteenth century, there was a general realization that more than custom was necessary as justification for the practice of granting exemption, and statutes and constitutional provisions providing for tax exemption were put into effect in the various states. Since the adoption of these constitutional provisions and statutes, the courts have generally adopted the doctrine that the statutes will be construed strictly, and property to be exempt must come clearly within the law. Thus, tax exemption in the United States is a privilege, not a right, and it rests upon specific constitutional or legislative provision.

The tax exemption provisions of the various states differ in certain particulars. The constitutional provisions of some states are self-executing and require the exemption of the property of religious groups. The constitutional provisions of other states are "permissive" in that the legislature is given the power to exempt church property if it so desires.[5] Still other constitutions make no specific mention of tax exemption, leaving it entirely up to the legislature. Most states limit the amount of property of religious groups which may be exempted. They use different measurements, however, in setting up the limits. In some states ownership alone is the test.[6] In others, the measure is either area or value. In still others, the measure is use. The "use" measure, which is sometimes qualified by the term "exclusive," is a difficult one to apply. Attempts to apply it have resulted in continuous litigation.

The earliest Nebraska law exempting property of religious organizations from taxation was a part of the statute of 1856 which pro-

[4] Zollmann, *American Church Law*, 329.
[5] *Ibid.*, 331.
[6] Torpey, *Judicial Doctrines of Religious Rights*, 191.

vided for the organization of religious societies or corporations.[7] It provided that "all property held by such societies or corporations as prescribed in this act, shall be exempt from taxation." This law was replaced, however, the following year when the Nebraska territorial legislature borrowed a portion of the Iowa Code. The new law listed classes of property "not to be taxed." Included in the various classes were all cemeteries and also,

> Fifth—The grounds and buildings of library, scientific, benevolent, and religious institutions or societies devoted solely to the appropriate objects of those institutions, not exceeding three acres in extent and not leased or otherwise used with a view to pecuniary profit;
>
> Sixth—The books, papers, furniture, and apparatus pertaining to the above institutions and used solely for the purposes above contemplated, and the like property of students in any such institutions, used for their education;
>
> Seventh—money and credits belonging exclusively to such institutions and devoted solely to sustaining them, but not exceeding in amount or income the sum prescribed by their charter.[8]

When the new constitution was adopted in 1866 this law, as well as other territorial legislation, was continued "in force until altered, amended, or repealed by the legislature."[9] The new constitution contained no specific reference to tax exemption for the property of religious groups but since it did provide that all corporations were to be taxed, the question was raised whether the exemption statute was constitutional. In fact, in the discussion over the possible adoption of a constitution in 1871, it was charged that the exemption statute "would not stand a single hour if contested before any judge of the state."[10]

One of the problems facing the members of the constitutional convention of 1871 was that of tax exemption for the property of religious groups. Early in the convention a resolution was introduced which would have given permission to the legislature to exempt property "used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes." The proviso was included, however, that property valued at $10,000 was the maximum which any church corporation might have exempted from taxation.[11]

[7] *Terr. Laws 1856,* 176-177.

[8] *Terr. Laws 1857,* (3rd Sess.), 148.

[9] *Const.* Art. XI, sec. 1 (1866). Although a minor amendment was made in 1869, this provision remained substantially unchanged until 1877.

[10] *Report of the Constitutional Convention of 1871,* III, 498-499.

[11] *Ibid.,* I, 94.

As finally submitted to the people, the constitution provided that in addition to public property,

> such other property as may be used exclusively for agricultural and horticultural societies, for school, public cemetery and charitable purposes, the buildings and grounds belonging to and used by any religious society for religious purposes to the value of five thousand dollars, may be exempted from taxation; but such exemption shall be only by general law.[12]

The tax exemption clause of the proposed constitution aroused considerable feeling in the state. The Nebraska Conference of the Methodist Episcopal Church had passed a resolution opposing any exemption of church property,[13] but the church influence was mainly against the adoption of the constitution because of the limitation placed upon the value of church property which might be exempted. In fact, this provision was apparently one of the two major reasons for the rejection of the constitution by the voters.

In 1875 the members of a new constitutional convention escaped the controversy which had arisen over the earlier constitution on the tax exemption clause by adopting a portion of the Illinois constitution of 1870.[14] As submitted to the people and subsequently adopted, the provision exempted public property and also provided that

> such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted from taxation, but such exemptions shall be only by general law.[15]

When the legislature replaced the earlier exemption statute in 1877, it adopted the wording of the new constitution to describe the property exempted from taxation.[16] The wording of the exemption statute remained unchanged until after the amendment of the exemption provision of the constitution in 1920.

Again in the constitutional convention of 1919-1920 the matter of tax exemption aroused considerable interest and debate. At least two proposals would have entirely eliminated tax exemption for the

[12] *Ibid.*, III, 457.

[13] For the text of the resolution see *Ibid.*, I, 504.

[14] *Ancient and Accepted Scottish Rite v. Board of County Commissioners,* 122 Neb. 586, 601 (1932).

[15] *Const.* Art. IX, sec. 2 (1875).

[16] *Laws 1877,* 44-45.

property of religious societies.[17] Some members of the convention, on the other hand, would have preferred to remove the matter from legislative hands and to make the exemption absolute in the constitution. Such a recognition in the constitution, it was claimed, would both recognize the custom of the state and remove a very touchy problem from legislative concern. The convention's committee on revenue and taxation, however, refused to accept either point of view. It submitted a proposal similar to that already in the constitution and a representative of the committee stated the preference of the committee to be that the tax exemption provision be left untouched because it felt the people of the state were "thoroughly well-satisfied" with it as it existed. Moreover, the representative of the committee stated that

> this property today is already exempt from taxation and it will continue to be so, but you put this in the exempted class of the Constitution and it will raise a lot of trouble all over the state, among those who are in favor of taxing church property, and it will inject into that an element that will endanger the adoption of the Constitution, for it was this religious question that caused the defeat of the Constitution of 1871, and it seems to me the part of wisdom that we should let that matter alone and not inject it into the question of the adoption of the Constitution.[18]

When questioned as to whether the new proposal left the matter "just as the old Constitution is," the speaker replied, "Yes, there is no change and we have been living under that for forty-five years." The convention accepted the view of the committee. As presented to the people and later adopted, the new provision read as follows:

> The Legislature by general law may exempt property owned by and used exclusively for agricultural and horticultural societies, and property owned and used exclusively for educational, religious, charitable or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user.[19]

The legislature in 1921 followed its predecessor of 1877 and modified the exemption statute to use the exact language of the amended constitution.[20] The legislative intent was apparently that of exempting

[17] For Proposals Number 22 and 30 see *Journal of the Nebraska Constitutional Convention of 1919-1920,* I, 67 and 76-77.

[18] *Ibid.,* 890.

[19] *Const.* Art. VIII, sec. 2 (1875-1920).

[20] *Laws 1921,* c. 133.

"from taxation all property that the Constitution as now amended permitted them to exempt."[21] The constitutional provision adopted in 1920 and the statute of 1921, which was passed to put it into effect, have remained unchanged.

Although the convention of 1919-1920 apparently believed it was leaving the exemption statute unchanged, there were several changes in wording which altered somewhat the meaning of the constitutional provision. For example, the new provision stipulated that, to be exempt, property must be "owned" as well as used for religious purposes. The term "educational" replaced the word "schools" in the description of property to be exempted. Likewise, the new provision stated that to be exempt property must not provide "financial gain to either the owner or user."

On the basis of the above historical survey of the major Nebraska constitutional provisions and statutes providing for tax exemption of the property of religious groups, certain generalizations would seem valid. In the first place, while earlier statutes used various measurements for the amount of property considered legally exempt, since 1875 the yardstick has been "exclusive use" for religious purposes. This was supplemented in 1920 by the requirement that the property be both "owned and used exclusively for religious purposes." In the second place, the various exemption statutes have usually included charitable, cemetery and educational property in the same clause with the property of religious groups. This is only reasonable since oftentimes religious groups operate charitable and educational institutions and maintain cemeteries, thus making these enterprises in fact inseparable from religious groups themselves. Finally, the Nebraska provisions for tax exemption have made no distinction between religious groups. Thus, there is no question of preference for a particular church.

The Nebraska Supreme Court has on several occasions clearly stated the justification for tax exemptions. On one such occasion it commented:

> As is said by many eminent authorities, the exemptions are granted on the hypothesis that the association or organization is of benefit to society, that it promotes the social and moral welfare, and, to some extent, is bearing burdens that would otherwise be imposed upon the public to be met by general

[21] *Ancient and Accepted Scottish Rite v. Board of County Commissioners,* 122 Neb. 586, 602 (1932).

> taxation, and that from these considerations the exemption is granted.[22]

Similarly, in 1922, when the taxation of a sectarian hospital was in question, the court indicated that

> part of the burdens of government in caring for the poor is borne by the hospital. Charitable gifts and gratuitous services are contributed to the welfare of society. There are therefore reasons for immunity from taxation.[23]

The Nebraska court has indicated that in the matter of taxation the legislature has plenary powers,[24] and it has never questioned the legality of tax exemption. It has been called upon constantly, however, to determine what organizations and what property fall within the tax exemption statutes. Out of this continuous litigation have emerged certain rather well-defined principles.

Generally, the American judiciary has favored a strict construction of the tax exemption statutes. The individual or the group seeking such exemption has the burden of proving that the property in question falls under the exemption statute.[25] This point of view is an established legal principle in Nebraska and has been announced at various times by the Nebraska Supreme Court. As early as 1900 when determining a case involving tax exemption the court commented that

> in arriving at a conclusion with respect to the matter we are to bear in mind that, the exemption claimed being an exception to the general rule of taxation, and in derogation of the equal rights of all, the statute is to be strictly construed. This does not mean that there should not be a liberal construction of the language used in order to carry out the expressed intention of the fundamental lawmakers and the legislature; but, rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption.[26]

The same principle was reiterated in 1901[27] and in 1917.[28] As a result, the court was undoubtedly correct in 1925 when it said, "the

[22] *Young Men's Christian Ass'n of Omaha v. Douglas County,* 60 Neb. 642, 646 (1900).

[23] *St. Elizabeth Hospital v. Lancaster County,* 109 Neb. 104, 106 (1922).

[24] See *State, ex rel. Spelts, v. Rowe,* 108 Neb. 232, 236 (1922) and *Am. Prov. of Servants of Mary Real Estate Corp. v. County of Douglas,* 147 Neb. 485, 486 (1946).

[25] Torpey, *Judicial Doctrines of Religious Rights,* 175-176.

[26] *Young Men's Christian Ass'n of Omaha v. Douglas County,* 60 Neb. 642, 646 (1900).

[27] *Watson v. Cowles,* 61 Neb. 216 (1901).

[28] *Mt. Moriah Lodge, A. F. & A. M. v. Otoe County,* 101 Neb. 274 (1917).

rule is settled in this jurisdiction that statutes, exempting property from taxation, should be strictly construed."[29] The application of the strict construction principle has at times been difficult. Such difficulty has arisen when the supreme court has been called upon to determine whether an organization is of such a character that property used by it would fall within the bounds of the exemption statute.

Various lodges in Nebraska have claimed tax exemption on the basis of their educational, religious or charitable purposes. The question has arisen not only whether lodges are charitable and educational organizations but also whether they have religious purposes which would give their property tax-exempt status. In determining this question the court has been forced to take into consideration the constitutional provisions prohibiting preference to any religious society and guaranteeing religious freedom. The constitutional provisions and statutes providing for tax exemption, of course, make no distinction between religious groups.

The stand of the Nebraska Supreme Court has not been entirely consistent on the question of whether or not lodges have such educational, religious or charitable purposes as to give their property tax-exempt status. In 1906 a fraternal beneficiary association was denied tax-exempt status because its property and funds were not used exclusively for charitable purposes.[30] The next year, however, the court examined the activities of another lodge and discovered that it was a charitable organization under the statutes because its purposes were those of caring for the sick and burying the dead of members. Its property, the court decided, was used "exclusively" for charitable purposes. The court emphasized that this did not mean that "all property belonging to the masonic order is exempt from taxation, or that any of its property is exempt because it is such order." Rather, said the court, the use of the property alone determines its exemption status.[31] In 1916 and 1917, however, other lodges were declared not to be charitable associations such as to be exempt from taxation.[32]

In 1921, therefore, when the Lincoln Scottish Rite Building Company attempted to qualify under the tax exemption statute, emphasis was placed upon both the charitable and the religious characteristics of the lodge. It is important to note that the statute under considera-

[29] *House of the Good Shepherd v. Board of Equalization,* 113 Neb. 489, 492 (1925).

[30] *Royal Highlanders v. State,* 77 Neb. 18 (1906).

[31] *Plattsmouth Lodge v. Cass County,* 79 Neb. 463, 471 (1907).

[32] *Grand Lodge, A. O. U. W., v. Sarpy County,* 99 Neb. 647 (1916) and *Mt. Moriah Lodge, A. F. & A. M. v. Otoe County,* 101 Neb. 274 (1917).

tion here had not as yet been amended after the constitutional convention of 1919-1920. The view of the lodge was that its "aims, objects and practices" were mainly charitable and religious in character. In fact, it was claimed, "charity and religion" were "so blended together in the organization" that it might "properly be termed exclusively charitable and religious." Therefore, it was claimed, "the building in question, being devoted to the promotion of the objects of the order, is property used exclusively for charitable and religious purposes within the meaning of the statute."

In support of the view that the lodge was a charitable institution, it was pointed out that the term "charity" was not limited in meaning to alms-giving but included "all enterprises that produce no profit to the promoters, but tend to the improvement, welfare and happiness of mankind." Such, in fact, were the activities of the lodge which instructed its members in their duties to others. In this way it encouraged those who were "depressed in spirit" and stimulated them not only to aid themselves "but to take an interest in the welfare of others." This instruction was sufficient, it was said, to cause the use of the building where such precepts were taught to be regarded as charitable within the meaning of the tax exemption statute. The definition of charity presented by the Scottish Rite group did not impress the supreme court. The court commented that common sense indicated that the framers of the constitution had in mind a

> concrete, practical, objective charity, manifested in things actually done for the relief of the unfortunate and the alleviation of suffering, or in some work of practical philanthropy, as contrasted with the sentimental or ethical viewpoint.[33]

Such "concrete" charity, the court felt, was not dispensed at the building under consideration. In fact, the building, erected at a cost of $150,000, contained on the main floor a reception hall, ladies room, cloak room, smoking room and a large room for conferring degrees. Underneath the main floor, the judge pointed out, there was a dining hall for 1000 people, pantries, and a heating plant. Moreover, of a large sum of money collected, "no fixed part" was allotted to charity and all but a "negligible amount of it was spent upon the building and in banquets and entertainments for its members and initiates." The court could not see that the building was used chiefly for charity.

The second claim of the lodge was that the building should be exempted because it was used for religious purposes. Prayers were said

[33] *Scottish Rite Building Co. v. Lancaster County*, 106 Neb. 95, 98 (1921).

when degrees were conferred and candidates for membership, it was said, were "taught and required to believe in God or a Supreme Being." They were also taught that the soul was immortal and that "God is the Father and we are brethern who owe a mutual duty to each other." Again the court was not impressed. It pointed out that no particular God was required and that there was really no religious test at all for membership in the Scottish Rite bodies. There was a clear distinction, the court felt, between such ethical teachings and the doctrines of religion. "One cannot espouse a religion," the court insisted, "without belief and faith in its peculiar doctrines." A belief in immortality does not denote religion, the court held, for it is limited to no particular religion and is really "an instinct of the human soul" which "many pagan and infidel philosophers" have asserted. In addition, the court said, if Scottish Rite bodies were religious orders, their officers would be clergymen or ministers and their services divine worship. A marked characteristic of religious worship in this country, the court insisted, is that "it should be held in public and with open doors." Therefore, it would be anomalous to accord religious sanction to meetings of secret societies "to which the public would be denied admittance."

At the end of its rather lengthy opinion, the court held that the building in question was not used chiefly, "still less exclusively, for either charitable or religious purposes." The building, therefore, could not be accorded a tax-exempt status.

The decision of the court was not satisfactory to the Scottish Rite bodies, and in 1932 the question of tax exemption for the same building was again before the supreme court.[34] This time, in a very lengthy opinion, the court discovered that the Scottish Rite building came within the provisions of the tax exemption statute. Justice Eberly, who wrote the opinion of the court, emphasized the fact that no portion of the temple was used for commercial purposes or for financial gain. Moreover, not only did the local group have subdivisions aiding in charity and education, but a portion of its income went to the parent organization which had donated over six million dollars to charities and education. The court was not concerned whether the charity dispersed was strictly public or private. The justice stated that Masonry was a system of morality teaching faith in God and immortality of the soul. It was not, however, "sectarian in its religious teaching." The district court had erred, said Justice Eberly, in holding that the statutory requirement of a "religious purpose"

[34] *Ancient and Accepted Scottish Rite v. Board of County Commissioners,* 122 Neb. 586 (1932).

> requires an organization whose primary purpose is a sectarian organization holding open meetings, open to the public, and teaching a faith and belief in some particular or special doctrine of faith of some kind, as distinguished from other accepted religious faiths; and that as the property was not used "exclusively for a religious purpose," as thus restricted, and by an owner identified with a class thus described, it was not subject to exemption.[35]

It was the purpose for which property was used and not the identity or character of the owner which determined the character of property with reference to tax exemption. In fact, the justice felt, the holding of the district court was incompatible with guarantees of religious freedom in the state constitution which permitted everyone "to worship Almighty God, according to the dictates of his own conscience." Likewise, the decision of the lower court was "a clear transgression" of the constitutional prohibition against giving preference by law to any religious society. The justice, therefore, concluded that

> neither the profession of a sectarian creed, nor the formal dedication or occupation of property to promote the objects and purposes of a faith thus expressed, is an essential element of a "religious use," nor a necessary prerequisite to and of an "exclusive religious purpose."[36]

The district court had also erred, the justice said, in holding that "educational purposes" under the statute meant the building must be used as a "school." The constitution as changed in 1920 and the statute as amended in 1921 had replaced the term "school" with the word "educational." The latter term, said Justice Eberly, was much broader in meaning and included a whole course of training "moral, intellectual, and physical." The justice felt that if the "achievements" of the Scottish Rite order were due to instruction received by its members in the temple, then "to the extent of such use an educational purpose would be involved."

The opinion of the court closed with a survey of the history of the tax exemption statute and a restatement of the doctrine that it was use alone which determined the tax exemption status of property. The justice emphasized that it was "the primary or dominant use, and not an incidental use" which controlled. It was asserted that the courts had uniformly held that the primary objects of a Masonic lodge were benevolence and charity and that such a lodge was therefore "a char-

[35] *Ibid.*, 592-593.
[36] *Ibid.*, 595.

itable institution." Within the meaning of the statute, the Scottish Rite building was owned and used exclusively for educational, religious, and charitable purposes and was therefore exempt from taxation. "To avoid any uncertainty which might otherwise arise," the court overruled two of its previous decisions in so far as they were in conflict with the new dictum of the court.[37] It would appear, thus, that while the principle that the tax exemption statutes are to be strictly construed is well established in Nebraska, a rather liberal definition was given to the term "religious purposes" in the important *Scottish Rite* case decided in 1932.

A second principle followed consistently by the Nebraska court in its interpretation of the tax exemption statutes has already been mentioned. Consistently the court has interpreted the constitutional provisions and statutes to mean that "use" is the determining factor when the tax exemption statute is in question. This yardstick was applied by the supreme court as early as 1887,[38] and the court has frequently reiterated its position. In 1897 the court insisted that "it is the exclusive use of the property which determines its exempt character."[39] Ten years later it stated categorically that "it is the use of the property and that alone" which determines tax-exempt status."[40] In 1922 the court twice restated the principle that under the law the use of property is the test of exemption.[41] In 1925 the court again said "the test is the use of the property itself,"[42] while in 1932 the court placed great emphasis upon the point that

> in this jurisdiction it is not the character of the owner but the nature of its use which must in each individual case furnish the test for determining the tax exempt character of the property involved.[43]

The principle that the use of property is the determinate in so far as tax exemption is concerned would appear to be settled in Nebraska.

[37] *Mt. Moriah Lodge, A. F. & A. M. v. Otoe County,* 101 Neb. 274 (1917) and *Scottish Rite Building Co. v. Lancaster County,* 106 Neb. 95 (1921).

[38] *Omaha Medical College v. Rush,* 22 Neb. 449 (1887).

[39] *Academy of the Sacred Heart v. Irey,* 51 Neb. 755 (1897).

[40] *Plattsmouth Lodge v. Cass Co.,* 79 Neb. 463 (1907).

[41] *Central Union Conference Ass'n v. Lancaster County,* 109 Neb. 106 (1922) and *St. Elizabeth Hospital v. Lancaster County,* 109 Neb. 104 (1922).

[42] *House of the Good Shepherd v. Board of Equalization,* 113 Neb. 489 (1925).

[43] *Ancient and Accepted Scottish Rite v. Board of County Commissioners,* 122 Neb. 586, 604 (1932).

The application of the "use" principle by the supreme court in *Scott v. Society of Russian Israelites*[44] resulted in the decision that property used exclusively for religious purposes was exempt from taxation. This was true, the court held, regardless of who the owner was and even if he received rent for the property from a lessee. Two years later, citing the *Scott* case, the attorney general applied the same interpretation of the "use" rule to land to be leased for the exclusive use of a school.[45] The rule, as applied, although it was apparently legal, did not seem justified since the owner might charge rent and still be tax exempt because of the nature of his tenant. As as result, in 1905 an unsuccessful attempt was made to amend the laws to provide that church property had to be owned by the congregation to make it tax exempt.

The constitutional provision as adopted in 1920 added the word "owned" to the word "used." Although the convention had discussed adding the word "by" after "owned," no action was taken.[46] The attorney general has suggested that the constitutional convention of 1920 added the word "owned," as well as the provision that property is not to be exempt if owned or used for financial gain or profit to either owner or user, in order to rectify the injustice of the *Scott* case.[47] After 1921, however, the supreme court continued to insist on "exclusive use" as the sole test of tax exemption,[48] and the attorney general has followed the court.[49] It might well be that in some future case emphasis will be placed upon ownership as well as upon use. There has been some feeling that injustice still exists and unsuccessful attempts were made in 1933 and 1935 further to clarify the constitution and the statutes on this matter.[50]

On a number of occasions the Nebraska Supreme Court has been called upon to determine in particular circumstances the meaning of "exclusive use" as provided by the constitution and statutes. Out of the necessity of applying the principle of "use" have come certain fairly well-established rules on what constitutes such "exclusive use" as to result in tax exemption. One such rule has resulted from the question of whether or not property held by a religious group with

[44] 59 Neb. 571 (1900).

[45] *Rep. Att'y Gen. 1902,* 260-261.

[46] *Journal of the Nebraska Constitutional Convention of 1919-1920,* II, 2742-2743.

[47] *Rep. Att'y Gen. 1942,* 573-574.

[48] *Ancient and Accepted Scottish Rite v. Board of County Commissioners,* 122 Neb. 586 (1932).

[49] See *Rep. Att'y Gen. 1950,* 507-511 where it is insisted that the character of the owner is beside the point.

[50] See *S. F.* 60 (1933), *S. F.* 61 (1933), and *H. R.* 557 (1935).

the intention of building in the future is so used as to be exempt from taxation. The court as early as 1894 decided that a religious society could not be given tax exemption on property held as a future building site even though rents from houses on the property went into the building fund. To clarify its rule the court commented:

> Let us suppose, merely by way of illustration, that one of the lessees of this real property should erect a building thereon for use as a saloon. Would it be contended that the property was, after the saloon was in operation, used exclusively for religious purposes merely because of appellant's intention to make such use of the rents issuing from the thus improved property? This question would meet with a prompt and unequivocal negative, and such negative would be a complete answer to the contention made on behalf of the appellant.[51]

A similar question was involved in the case of the Omaha Y. M. C. A. building. While it was intended eventually to use the first floor of the building for Y. M. C. A. work, it was not so used as yet and was therefore taxable.[52] The attorney general has followed the court's decision and advised that property held by a church with the intent of building is not exempt from taxation because it is not used exclusively for the purposes set out in the statute.[53] The law does not wish to be unfair, however, and the supreme court held in 1938 that while "use" was the determining factor, the character of the property for taxation purposes was not changed during the time a building of an educational, charitable or religious organization was being rebuilt.[54]

The Nebraska Supreme Court has also found it necessary to establish rules with reference to tax exemption on property, the income from which goes for the support of educational, charitable and religious organizations. In three cases spread over a quarter of a century, the court has made its position fairly clear on the tax-exempt status of such property. The first of these cases, decided in 1897, involved a garden owned by a parochial school. The vegetables from the garden were not sold but were used to supply the school tables at which officers, teachers and students of the school were fed. The court stated that to be exempt property must "be devoted exclusively for school or some other specified exempt purpose." It then emphasized the fact that the products were not sold, but were actually consumed at the

[51] *First Christian Church of Beatrice v. City of Beatrice,* 39 Neb. 432, 437 (1894).
[52] *Young Men's Christian Ass'n of Omaha v. Douglas County,* 60 Neb. 642 (1900).
[53] *Rep. Att'y Gen. 1922,* 370-371.
[54] *McDonald v. Masonic Temple Craft,* 135 Neb. 48 (1938).

school. It decided, therefore, that the garden was used exclusively for school purposes and was exempt from taxation.[55] In 1922 a second case with a similar problem was decided by the supreme court. This time it was tax exemption of the farm and dairy operated by Union College which was at stake. The court examined the facts and discovered that agriculture and dairying were subjects of instruction at the college; that the dairy seemed to be a source of profit; that the products of the dairy were used in other departments; and that proceeds from the sale of dairy products went into the general treasury of Union College. The court decided that any profits from the dairy were incidental and that outside of school purposes no one received any profit. It was decided, therefore, "that the property in controversy is used exclusively for school purposes within the meaning of the constitutional and statutory provisions relating to exemption."[56]

A somewhat similar problem was involved in a third case. The property in question was a laundry operated by a religious and charitable organization. This organization, the House of the Good Shepherd, had as its aim the aiding of "fallen women" by teaching them "habits of industry." It was for this purpose that the laundry was used, but from its operation considerable revenue was derived. This revenue was used for educational and charitable purposes. The court, in its majority opinion, held that since the income did not "inure to the benefit of the owners or the users," the laundry was tax exempt. One of the judges dissented, however, claiming that the laundry was a commercial enterprise in competition with other taxpaying laundries, so that giving tax exemption to it actually "levies a forced contribution for the support of the institution and indirectly commits the administration of a part of the public revenues to non-officials." Moreover, he asserted, the fact that profits were used for a charitable purpose "does not change their character as financial profits."[57]

Each of the above cases involved property actually operated by an educational, charitable or religious organization and used directly by it. In a number of instances it has been necessary to determine whether property owned by such organizations and leased to another party is tax exempt if the income is devoted exclusively to educational, religious or charitable uses. In such cases the supreme court has uniformly held that when property is leased for commercial purposes it is not used for tax-exempt purposes although the income therefrom

[55] *Academy of the Sacred Heart v. Irey,* 51 Neb. 755 (1897).

[56] *Central Union Conference Ass'n v. Lancaster County,* 109 Neb. 106, 108 (1922).

[57] *House of the Good Shepherd v. Board of Equalization,* 113 Neb. 489, 495-497 (1923).

may be so used. The court first drew a distinction between the use of leased property and the use of income therefrom in 1894 when it pointed out that

> it might be contended with much plausibility that the money derived from rents is property to be used exclusively for religious purposes. After the rent has been collected it is as property very distinct from the realty out of which it arose.[58]

Six years later the court insisted that "there is a clear and well-defined distinction between the use of property and the use of the income derived therefrom."[59] As applied to buildings leased by religious, educational or charitable organizations, this rule of law has been stated many times by the Nebraska Supreme Court. It has never been more clearly stated than in 1925 when the court said:

> Property of a religious, educational or charitable institution which is leased to others and used as a commercial enterprise is not exempt from taxation, even though the income from such property is devoted to educational, religious or charitable purposes.[60]

The question of the tax-exempt status of farm land owned and leased by educational, religious or charitable organizations, the income from which is devoted to the purposes of the organization, has never been before the supreme court. It would seem, however, that the rule announced by the court with reference to buildings is broad enough to include other types of income property. This has been the attitude of the attorney general on several occasions when he has been asked for opinions on the matter.[61] If, however, farm land is owned by a church and farmed by the members without compensation, it may be granted tax exemption.[62]

The above survey of the judicial position in Nebraska on the matter of the tax-exempt status of commercial property would seem to indi-

[58] *First Christian Church of Beatrice v. City of Beatrice,* 39 Neb. 432, 436 (1894).

[59] *Young Men's Christian Ass'n of Omaha v. Douglas County,* 60 Neb. 642, 647 (1900).

[60] *House of the Good Shepherd v. Board of Equalization,* 113 Neb. 489, 492 (1925). For other examples see *Young Men's Christian Ass'n v. Lancaster County,* 106 Neb. 105 (1921); *North Platte Lodge, B. P. O. E., v. Board of Equalization,* 125 Neb. 841 (1934); and *Masonic Temple Craft v. Board of Equalization,* 129 Neb. 293, rehearing denied 129 Neb. 827 (1935).

[61] See for example, *Rep. Att'y Gen. 1916,* 31-32; *Rep. Att'y Gen. 1918,* 122; *Rep. Att'y Gen. 1932,* 296; and *Rep. Att'y Gen. 1950,* 200-202.

[62] *Rep. Att'y Gen. 1954,* 22-25.

cate that if property is operated and used directly by a tax-exempt group for its purposes, such property is "used exclusively" for those purposes and any profit which may accrue incidentally does not affect its tax-exempt character. In fact, the supreme court has stated that "in determining whether or not property falls within a tax exemption provision, the primary or dominant use, and not an incidental use, will control."[63] On the other hand, it would appear that whenever a tax-exempt group leases its property, for whatever purpose, that property loses its tax-exempt status, although the income from the property if applied to tax-exempt purposes is tax exempt. It would seem that the Nebraska court is following the general rule in refusing to exempt property owned by religious societies but leased to others.[64] Although the line drawn here seems fairly distinct, it remains sufficiently uncertain that considerable litigation may well be expected in the future.

The general rule is that parsonages are not exempt unless a statute or constitutional provision expressly exempts them.[65] The Nebraska rule on this matter is somewhat in doubt. The specific question has apparently never been before the supreme court. The supreme court did decide, however, that a school building partially occupied by a teacher and his family was not used exclusively for school purposes and therefore was not entitled to tax exemption. It was implied that if such residence was necessary in the discharge of the teacher's duties as an educator, then such exemption might be legal.[66] The attorney general has expressed his opinion on the matter a number of times. In 1902 he advised two county attorneys that parsonages were not exempt.[67] In the first opinion he cited a number of cases from other states to support his view. In the second opinion he pointed out that a parsonage was not used "exclusively" for religious purposes and was, therefore, not exempt. In 1926 the attorney general again held parsonages taxable, although this time he pointed out that "the authorities are not in entire accord, however, upon the question of taxation of parsonages."[68] By 1948 the attorney general had completely changed his view and announced that in his opinion a "house or parsonage is exempt under the statute when it is actually used by the pastor."[69]

[63] *Ancient and Accepted Scottish Rite v. Board of County Commissioners,* 122 Neb. 586, 604 (1932).
[64] Zollmann, *American Church Law,* 349.
[65] *Ibid.,* 353-354.
[66] *Watson v. Cowles,* 61 Neb. 216 (1901).
[67] *Rep. Att'y Gen. 1902,* 281-282 and 326-327.
[68] *Rep. Att'y Gen. 1926,* 381.
[69] *Rep. Att'y Gen. 1948,* 482-483.

Apparently the practice of assessors in Nebraska at mid-century was to consider parsonages tax exempt.

Other related problems concerning the tax exemption status of residences have also been referred to the attorney general. For example, the attorney general has advised that individual leaseholders in Riverside Park, a religious camp ground owned by the Nebraska Conference of the Evangelical Association, were not exempt from taxation because the buildings were not owned and used exclusively for religious purposes.[70] On the other hand, the attorney general was asked in 1946 to give his opinion as to whether houses owned by Dana College for the use of its instructors were tax exempt. The attorney general felt that the professors were brought closer to their work by such housing. This had unquestionable advantages, he felt, for both the college and the instructors. Moreover, he could see no distinction in terms of tax exemption between homes for instructors and dormitories for students. He decided, therefore, that such housing was used for educational purposes and was tax exempt under the statutes.[71]

The application of the principle of "exclusive use" and the rule that property leased by a religious, charitable or educational organization to others is not tax exempt have resulted in the adoption of another principle by the Nebraska Supreme Court. It has held on numerous occasions that when a portion of a building owned by a tax-exempt organization is leased to others for business purposes, that portion is taxable. In other words, for taxation purposes, such property is divisible. This "divisible" principle has applied especially to Y. M. C. A. buildings and lodge buildings of which portions are leased for commercial purposes. The Nebraska court first stated the "divisible" principle in 1900 when the Omaha Y. M. C. A. building was under construction. The court emphasized the "exclusive use" doctrine and pointed out that in order to be accorded tax-exempt status, it was not necessary "that the property should be such as to permit of its separation into distinct and definite parcels or tracts of land."[72] In 1921, using the precedent of the *Omaha Y. M. C. A.* case, the court reached the same conclusion with reference to the Lincoln Y. M. C. A. building. In this case, even though the profit from the cafeteria went into the organization's treasury which still operated at a deficit of $1000 per month, the court held that the portion of the building used for such business purposes should be taxed with due reference to the

[70] *Rep. Att'y Gen. 1926,* 385.

[71] *Rep. Att'y Gen. 1946,* 425-427.

[72] *Young Men's Christian Ass'n of Omaha v. Douglas County,* 60 Neb. 642, 649 (1900).

taxable value of the entire property.[73] In several cases involving lodge buildings the same principle has also been applied. In at least one such case the court has gone so far as to set the tax valuation of the portion of the building used for business purposes.[74]

The question of tax exemption has been raised with reference to other than real property. The attorney general has indicated that an automobile used exclusively for educational, religious, charitable, or cemetery purposes is exempt. If it is used for family or business purposes as well as for the above purposes it is not exempt.[75] Ownership of an automobile for which tax exemption is claimed is immaterial since use is the only test of exemption.[76] In 1939 the attorney general was asked for an opinion on whether or not intangible property such as stocks and bonds, which belong to educational, religious, or charitable organizations, was taxable. He replied that the Nebraska courts had not passed on the problem and that in his judgment "the question presented would turn upon the use to which the intangible property was intended to be put." He felt if the principal use of the income from the funds was exclusively for religious, charitable, or educational purposes, then the funds would be exempt under the law. His argument was that there would be no object in exempting lands and buildings of a college from taxation and at the same time taxing the endowment fund designed for its support.

At times the doctrine of exclusive use has been applied to determine the time at which tax exemption begins and ceases. The attorney general has stated that property does not acquire tax-exempt status when title passes but only when it is used exclusively for tax-exempt purposes.[77] The attorney general has ruled that although the title to a church building had not passed to the trustees of the religious society but was held by a loan corporation, the religious society was making monthly payments, and the building was used solely for religious purposes and was therefore exempt.[78] If a tax-exempt corporation purchases property on which back taxes are due, they are not canceled.[79] However, the supreme court has held that if real estate is purchased and put to educational, religious or charitable use after the assessment but before the levy of taxes, the authorities are without

[73] *Young Men's Christian Ass'n v. Lancaster County,* 106 Neb. 105 (1921).

[74] *Masonic Temple Craft v. Board of Equalization,* 129 Neb. 293, rehearing denied 129 Neb. 827 (1935).

[75] *Rep. Att'y Gen. 1938,* 116-117.

[76] *Rep. Att'y Gen. 1942,* 573-574.

[77] *Rep. Att'y Gen. 1926,* 373.

[78] *Rep. Att'y Gen. 1942,* 182-183.

[79] *Rep. Att'y Gen. 1918,* 217. See also *Rep. Att'y Gen. 1950,* 208-209.

power to collect taxes for "that power must exist when it is assumed to exert the power."[80] Just as tax exemption begins when property is used for tax-exempt purposes, so it ceases when property is no longer used for those purposes.[81]

In Nebraska, as in other states, the tax exemption provisions apply only to the general property taxes and do not exempt any organization or individual from paying special assessments. This rule was laid down by the Nebraska Supreme Court in 1894, when it was decided that a religious society was not exempt from a special tax for paving and the building of sidewalks.[82] The court reasoned that any other interpretation would create confusion between the tax exemption clause of the constitution and the clause giving municipalities power to levy uniform assessments for local improvements. Although the specific problem has not been before the court for over fifty years, the attorney general in 1926 and again in 1940 insisted that religious organizations were not exempt from special assessments for paving[83] and sewer laying.[84] Likewise, in 1948 the attorney general ruled that members of the Franciscan Sisters, a religious society, were not exempt from paying old-age assistance assessments.[85]

In 1926 the Nebraska Supreme Court was asked to determine whether or not a religious society was exempt from the state inheritance tax.[86] The court pointed out that the inheritance tax was not a tax on property "but upon the right of succession." It reviewed the statute providing for the inheritance tax[87] and applied the principle that tax exemption statutes must be strictly construed. The court's examination of the statute did "not disclose that a legacy to a religious or charitable society is exempt from an inheritance tax." Five years later the statute providing for the inheritance tax was changed specifically to exempt bequests or gifts to organizations operated exclusively for religious, charitable or educational purposes.[88] The "use" rule was thereby applied in Nebraska to the inheritance tax as well as to general taxation. Nebraska practice would seem to bear out the general rule that gifts or devises to religious societies are not exempt unless there is specific provision for exemption in the law.

[80] *Am. Prov. of Servants of Mary Real Estate Corp. v. County of Douglas,* 147 Neb. 485 (1946).
[81] *Holthaus v. Adams County* 74 Neb. 861 (1905).
[82] *City of Beatrice v. Brethren Church of Beatrice,* 41 Neb. 358 (1894).
[83] *Rep. Att'y Gen. 1926,* 385-386.
[84] *Rep. Att'y Gen. 1942,* 181.
[85] *Rep. Att'y Gen. 1948,* 661-662.
[86] *In re Estate of Rudge,* 114 Neb. 335 (1926).
[87] *C. S. 1922,* sec. 6153.
[88] *Laws 1931,* c. 132.

The strict construction of the inheritance tax statute has resulted in a decision by the Nebraska Supreme Court that a foreign corporation, even though organized exclusively for charitable purposes, may not be exempted from paying the Nebraska inheritance tax. This was true even though a foreign corporation, the Topeka Branch of the Women's Foreign Missionary Society of the Methodist Episcopal Church, had become a body corporate in Nebraska. Since it had already been incorporated in Kansas, it was still considered a foreign corporation for the purpose of imposing the inheritance tax. Likewise, the court held the World Service Agencies of the Methodist Church not to be an organization exempt from inheritance tax in Nebraska because the part of the inheritance tax statute providing for exemptions

> refers, under a strict construction thereof, to such corporations, organizations, associations or foundations organized and operated exclusively for religious, charitable or educational purposes within the state of Nebraska and not a nonresident thereof, and that such was the legislative intent.[89]

In 1949 a portion of the inheritance tax statute was amended to provide that no tax would be imposed on a legacy or gift if its use were confined to Nebraska or if a reciprocal privilege of tax exemption were granted in the laws of the state in which the foreign corporation was domesticated.

The historical development of tax exemption for religious property in Nebraska seems to have followed generally the pattern of development in other states. Such property has always been exempt in Nebraska but since 1875 the constitution has permitted, but not required, the legislature to exempt from general taxation both real and personal property used exclusively for educational, religious, charitable and cemetery purposes. The legislature has incorporated the wording of the constitution into statutes providing for tax exemption.

In the course of interpreting the Nebraska tax exemption provisions, the supreme court has developed certain principles and rules for determining the tax-exempt status of property. It has held consistently that the tax exemption statutes must be strictly construed. Such strict construction has been broad enough, however, to permit the property of certain fraternal lodges to be considered tax exempt because such propery is used for educational, religious and charitable purposes. The court has also consistently held that use alone is the

[89] *In re Sautter's Estate,* 142 Neb. 42, 52-53 (1942).

measure to be applied in determining the tax status of property. In interpreting this difficult principle the court has developed a cluster of rules to aid in its application. For example, it has held that intent to use property for a tax-exempt purpose is not sufficient to give that property tax-exempt status. For tax exemption purposes the court has carefully drawn a line between property and the income therefrom. Apparently if property is used directly by a tax-exempt organization in its activities, such property is tax exempt even though incidental income is received from business activities. On the other hand, if the tax-exempt organization leases its property to another, such property is taxable even though the income is used to carry out the purposes of the organization. The court has also held that property, such as a Y. M. C. A. building, which is used partially for tax-exempt purposes and partially for commercial purposes, may be divided and only that part actually devoted to business purposes taxed. Another principle followed by the Nebraska courts is that the tax exemption statute applies only to general property taxes. Such special assessments or taxes as those for paving, sewer laying, and old age assistance are not abrogated by the general tax exemption statute. A special statute exempting domestic tax-exempt organizations from paying the state inheritance tax, however, has been a part of Nebraska law since 1931.

In Nebraska the practice of tax exemption for property of religious organizations has neither in the past nor in the present been seriously threatened. This is apparently generally true in the nation as a whole. This indirect but very real aid by the state to religious societies and associated organizations has not been a source of great controversy although the application of the practice to certain kinds of property has resulted in considerable litigation. It is difficult to explain why the practice has not resulted in vigorous controversy especially at the present time when there is so much feeling against direct aid of any kind to church-related groups. In any case, it may well be, as Stokes points out, that

> in view of the antichurch movement in various parts of the world, the temper of the times, and the need for additional public revenue, it is not unlikely that the whole question of tax exemption for religious and educational institutions will come to the front in other parts of the country in the not far distant future.[90]

[90] Stokes, *Church and State in the United States,* III, 427.

10 / *Conclusions*

In the opening chapter of this study the hope was expressed that it might make some contribution to both a better understanding and a solution of the problem of what constitutes the most desirable relationship of church and state. First, on the basis of the study there emerge certain broad generalizations on the legal relationship of church and state in Nebraska. Secondly, I should like to make some suggestions for legislative action which, in my opinion, might improve the relationship of church and state in Nebraska. Finally, it appears desirable to indicate certain general problems for which no satisfactory solutions have as yet been found but which may be expected to demand solutions in the not too distant future.

The study seems to support several broad generalizations. In the first place, some light has been thrown upon the meaning of what is commonly called the American principle of "separation of church and state." If those who use this phrase mean that no particular religious society has been given special privileges or status by the state and that the state has not exercised undue control over the church, then separation of church and state apparently exists and has always existed in Nebraska. This study has revealed no evidence of an "establishment" of any church. If, however, those who use the phrase mean that a "wall of separation" has been erected between the state and *religion,* neither historical development nor current practice would support their contention. In Nebraska not only is the state committed by its fundamental law to protect religious freedom, but in official pronouncements agencies of the state have consistently shown deep respect and consideration for religion and God. The Nebraska constitution asserts that religion is essential to good government and its pre-

amble expresses gratitude to God. Moreover, the state has granted privileges to religious societies and their representatives. In fact, "separation of church and state" in Nebraska has meant equal treatment of all religious groups by the state but has certainly not meant that the state has no concern for religion. In the second place, the study suggests that problems of adjustment between church and state have been more frequent than is generally realized. It also suggests that there is no single formula which can be applied in all cases for adjustment of such problems. In the third place, comparison would indicate that Nebraska practices in the area of church-state relationships are not very different from those of the other states. Finally, it would appear valid to say that the agencies of the State of Nebraska have usually been found on the side of religious liberty. It is not surprising to find, however, since religious liberty is a growing concept, that at times, under various types of pressure, actions have been taken which were opposed to religious liberty.

It appears advisable that, in the interest of a better relationship between church and state and therefore in the interest of religious liberty, certain legislative action be considered in Nebraska. Nebraska has effectively used local option in enlarging the religious freedom of its citizens. The statutes prohibiting Sunday barbering and the wearing of religious garb by teachers might well be examined and the possibility of placing these activities under local option be considered. Since the state statutes prohibiting profanity and setting controls over Sunday activities are far more often violated than enforced, the possibility of their repeal might receive serious consideration. It might be well also to examine the desirability of re-establishing a limitation upon the amount of property which religious societies may acquire.

Certain problems of adjustment in the area of church and state relationships in Nebraska, although not of immediate concern, may well demand solutions in coming years. At present there is apparently little controversy in Nebraska concerning the desirability of granting tax-exempt status to property used for religious purposes. It is not unlikely, however, that the matter will be re-examined. While, at the moment, church-state relationships in the field of education in Nebraska seem to have been satisfactorily adjusted, there are various issues which might break out into heated controversy at any time. The freedom and even the existence of the parochial schools might be at stake in such a controversy. In periods of international tension the parochial school becomes suspect in the eyes of many, and further attempts by "patriotic" groups to limit or even eliminate such schools may be expected. At the same time, the rising fixed costs of operating

schools may bring demands, especially from Roman Catholic quarters, for either direct or indirect financial aid from the state. Such a demand would doubtless initiate a lively controversy. The relationship of religious teaching to the public schools may also again become a controversial issue in Nebraska. There seems to be a growing feeling that children should at least be given formal instruction in certain moral fundamentals which are similar to religious fundamentals. The difficulty of separating religion as an integrative force from religion as denominational belief has so far made impossible the development of any satisfactory constitutional plan for religious education in the public schools. The recent decision of the United States Supreme Court in which the New York released-time program was declared constitutional may influence Nebraska practice in the future.[1] Another problem of a general nature and of fundamental importance concerns the future of religious freedom, which is closely bound up with the relationship of church and state. Both the principle of separation of church and state and the right of religious freedom imply not only that the state will be free from control by the church, but that the church will be free from control by the state. In Nebraska, as in the nation, it seems that there is little danger at present of the church's exercising any real control over the state. A very present danger to the principle of separation of church and state, however, is the threat that the state may exercise undue control over the affairs of religious societies, thereby limiting religious freedom. In general, Nebraska seems to have placed quite satisfactory limitations on its control over religious societies and beliefs. In recent years, however, the Federal Government has been gradually assuming jurisdiction over certain church-state problems, especially in the field of education, by expanding the Fourteenth Amendment to include the first eight amendments. Such expansion of federal jurisdiction should be seen in the perspective of expanding nationalism with its promise of reducing the area of religious freedom by imposing national uniformity at the expense of local solutions, which Nebraskans have found so useful in solving controversial religious issues. The extent to which the expansion of federal jurisdiction will go is unknown, but Nebraskans should be aware of the trend and of its implications for both the principle of separation of church and state and for religious freedom. It should be remembered that whatever limits the area of religious freedom will also limit freedom in other areas.

[1] *Zorach v. Clauson,* 343 U. S. 306 (1952).

At times bitter controversies have arisen in Nebraska over the proper relationship of church and state. Out of these controversies there has been achieved a reasonable working relationship between the various religious societies and the state. It may be expected that in the future other controversies will arise over the proper relationship of church and state. It may also be expected that a reasonable working relationship will be maintained if Nebraskans are willing to protect the religious freedom of all in the best American tradition, as voiced by the late Justice Oliver Wendell Holmes:

> The best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[2]

[2] *Abrams v. United States,* 250 U. S. 616 (1919).

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